2409

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 224.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

HOSEA B. MOULTON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MARCH 15, 1900.

(17,672.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 11, 1900.

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a *Transcript of Record.*

Court of Appeals, District of Columbia, October Term, 1899.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
HOSEA B. MOULTON. } No. 909.

Appeal from the supreme court of the District of Columbia.

Filed June 16, 1899.

1 In the Court of Appeals of the District of Columbia.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
HOSEA B. MOULTON. } No. 909.

Supreme Court of the District of Columbia.

HOSEA B. MOULTON
vs.
DISTRICT OF COLUMBIA. } No. 41837. At Law.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Declaration, &c.

Filed February 8, 1898.

In the Supreme Court of the District of Columbia.

HOSEA B. MOULTON, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } No. 41837. At Law.

The plaintiff sues the defendant, a municipal corporation under the laws of the United States.

1.

For that whereas, before and at the time of the committing by the defendant of the grievances hereinafter-mentioned, the plaintiff was a lawyer practicing his profession in the District of Columbia, and gaining large profits thereby, and there then was, and from thence hitherto has been, and still is, a certain public highway in the District of Columbia, known as Park street, for all persons to go, return, pass, and repass in, by and with coaches, wagons,
2 and other vehicles at all times of the year, at their free will and pleasure; and whereas, before and at the time of the

committing of the said hereinafter-mentioned grievances, it then and there became and was the duty of the defendant to keep said Park street free from obstructions likely to scare or frighten horses passing and repassing thereon, so long as said Park street remained open for all persons to go, return, pass, and repass in carriages and other vehicles as aforesaid.

But the defendant, well knowing the premises, and neglecting its duty in that behalf, to wit, on the twenty-sixth day of November, 1896, and prior thereto, wrongfully, negligently, and injuriously put and placed on said Park street a certain apparatus or machine commonly called a steam roller, which said steam roller was an obstruction likely to scare horses passing and repassing on said Park street, as aforesaid, and wrongfully, negligently, and injuriously kept and continued the same therein for a long time, to wit, for the space of two days, so as to be a public nuisance, and dangerous to travelers on said Park street with their carriages and horses, in that it was likely to scare and frighten, and did scare and frighten horses passing and repassing on said Park street; by means and in consequence of which said negligence and improper conduct of the defendant in that respect, a certain horse of the plaintiff on the date aforesaid, driven by the plaintiff with due care, and drawing and pulling a certain carriage of the plaintiff, with the plaintiff therein, then and there going and passing in and through the said Park street, as aforesaid, then and there became and was frightened at, and on account of, the aforesaid obstruction, to wit, the said steam roller negligently, wrongfully, and injuriously left and permitted by the defendant to remain in said Park street as aforesaid, and by reason thereof, became and was so unmanageable, and so beyond the control of the plaintiff, that the said carriage of the plaintiff, with the plaintiff therein as aforesaid, was then and there overturned and the plaintiff thrown violently and with great force to and upon the ground, by means whereof the plaintiff became and was greatly hurt, bruised, cut, and wounded, sick, sore, lame, and disordered, and became and was, and still is, permanently injured internally, and in and about the head, so that his memory was and is permanently affected and impaired, whereby he suffered and still suffers great pain and agony, and was put to great expense for nursing, medical attendance, and medicines, and whereby he was permanently hindered and prevented to a great extent from transacting and attending to his necessary and lawful affairs, and permanently hindered and pre-
3 vented to a great extent from practicing his profession as attorney as aforesaid, and from gaining large profits incident thereto, all to the damage of the plaintiff in the sum of twenty-five thousand dollars ($25,000.00), wherefore he brings his suit.

2.

For that whereas, before and at the time of the committing of the hereinafter-mentioned grievances by the defendant, the plaintiff was a lawyer practicing his profession in the District of Columbia, and was gaining and was likely thereafter to gain, large profits thereby, and there then was and from thence hitherto hath been, and still is,

a certain public highway in said District called Park street, for all persons to go, return, pass and repass in, by and with carriages and other vehicles at all times at their free will and pleasure; it thereupon became and then and there was the duty of the defendant to keep said Park street free from dangerous obstructions likely to scare and frighten horses passing and repassing along and through said Park street, so long as said Park street remained open to all persons to go, return, pass and repass thereon as aforesaid.

But the defendant, then and there neglecting its duty in that behalf, to wit, on the twenty-sixth day of November, 1896, and prior thereto, said Park street then and there being open for all persons to go, return, pass and repass, as aforesaid, wrongfully, negligently and injuriously put and placed, and caused to be put and placed on said street a certain broken and disabled apparatus or machine known as a steam roller, which said steam roller was an obstruction likely to scare horses passing and repassing on said Park street as aforesaid, and wrongfully, negligently, injuriously and unnecessarily kept and continued the same and permitted it to remain therein, for a long time, to wit, for the space of two days; in consequence of which said negligent and improper conduct of the defendant, while the said Park street was then and there, to wit, on the date aforesaid, greatly obstructed by the said broken and disabled steam roller placed on said Park street by the defendant as aforesaid, and by the defendant suffered and permitted to remain on said street as aforesaid, so as to be a great nuisance, and dangerous to travelers and passengers on said Park street with their horses and carriages, in that it was likely to scare and frighten horses passing and repassing on said Park street as aforesaid; and while the plaintiff was carefully driving a horse attached to a carriage of the plaintiff, in which he, the plaintiff, then and there was, in and upon the said Park street, the said horse of the plaintiff then and there became and was frightened at, and made unmanageable and ungovernable by, the said steam roller negligently and improperly suffered and
4 permitted by the defendant to remain in said Park street as aforesaid, on the date aforesaid, so that the said carriage of the plaintiff, in which the plaintiff was riding as aforesaid, was then and there overturned and upset, and the plaintiff was thrown violently out against and upon the ground; by reason whereof the plaintiff became and was greatly hurt, bruised, cut and wounded, sick, sore, lame and disordered, and became and was, and still is, permanently injured internally, and in and about the head so that his memory was and is permanently affected and impaired, whereby he suffered and still suffers great pain and agony, and was put to great expense for nursing, medical attendance and medicines, and whereby he was permanently hindered and prevented to a great extent from transacting and attending to his necessary and lawful affairs, and permanently hindered and prevented to a great extent from practicing his profession as attorney as aforesaid, and from gaining large profits incident thereto, all to the damage of the plaintiff in the sum of twenty-five thousand dollars ($25,000.00), wherefore he brings this suit.

3.

For that whereas, before and at the time of the committing of the hereinafter-mentioned grievances by the defendant, the plaintiff was a lawyer, practicing his profession in the District of Columbia, and was gaining, and was likely thereafter to gain, large profits thereby, and there then was, and from thence hitherto hath been, and still is, a certain public highway in said District, called Park street, for all persons to go, return, pass and repass in, by and with carriages and other vehicles, at all times, at their free will and pleasure; and it thereupon became, and then and there was, the duty of the defendant to keep said Park street free from dangerous obstructions likely to scare and frighten reasonably gentle horses passing and repassing along and through said Park street, so long as said Park street remained open for all persons to go, return, pass and repass thereon as aforesaid; but the defendant, then and there neglecting its duty in that behalf, to wit, on the twenty-sixth day of November, 1896, and for a long time prior thereto, to wit, for the space of two days, said Park street being then and there, and during said period, open for all persons to go, return, pass and repass, as aforesaid, wrongfully, negligently and knowingly suffered and permitted a certain apparatus or machine known as a steam roller, which said steam roller the defendant then and there, and during said period, well knew was on said street, and well knew was an obstruction likely to scare and frighten horses passing and repassing on said Park street as aforesaid, in consequence of which said negligent and improper conduct of the defendant, while the said Park street was then and there, to wit, on the date aforesaid, greatly obstructed by the said steam roller, knowingly suffered and permitted by the defendant to remain on said street as aforesaid, so as to be a great nuisance and dangerous to travelers and passengers on said Park street with their horses and carriages, in that it was likely to scare and frighten reasonably gentle horses passing and repassing on said street, as aforesaid, and while the plaintiff was carefully driving a reasonably gentle horse attached to a carriage of the plaintiff, in which he, the plaintiff, then and there was, in and upon the said street, the said horse of the plaintiff then and there became and was frightened at and made unmanageable and ungovernable by, the said steam roller, negligently and improperly suffered and permitted by the defendant to remain in said Park street, as aforesaid, on the date aforesaid, so that the said carriage of the plaintiff, in which the plaintiff was riding as aforesaid, without fault on the part of the plaintiff, was then and there overturned and upset, and the plaintiff was thrown violently out, against and upon the ground, whereby the plaintiff was greatly hurt, bruised, cut and wounded, and became sick, sore, lame and disordered, and was put to great expense for nursing, medical attendance, and medicines, and was seriously and permanently injured, physically and mentally, and suffered, and still suffers, and is likely in the future to suffer, great pain and injury, and whereby also the plaintiff was permanently hindered and prevented to a great

extent from transacting and attending to his necessary and lawful affairs, and permanently hindered and prevented to a great extent from practicing his said profession, as aforesaid, and from gaining large profits incident thereto—all to the damage of the plaintiff in the sum of twenty-five thousand dollars ($25,000.00), wherefore he brings his suit.

4.

For that whereas, before and at the time of the committing by the defendant of the grievances hereinafter mentioned, the plaintiff was a lawyer and was engaged in the practice of his profession in the District of Columbia; and for that there then was, and from thence hitherto has been, and still is, a certain public highway in said District known as Park street, of which said Park street the defendant, as a municipal corporation, then and there had control, and it then and there became and was the duty of the defendant to keep said Park street free from obstructions likely to scare and frighten
6 reasonably gentle horses passing along said highway; but the defendant heretofore, to wit, on the twenty-sixth day of November, 1896, and for a long time, to wit, two days prior thereto, wrongfully, negligently and knowingly suffered and permitted a certain steam roller to be and remain upon said Park street, the said steam roller then and there, as the defendant then and there well knew, being an obstruction likely to scare and frighten reasonably gentle horses passing and repassing on said highway, and said steam roller then and there being and constituting, as the defendant then and there well knew, a public and dangerous nuisance, in consequence whereof, while the plaintiff on said last-mentioned day was driving along said street in a certain carriage drawn by a reasonably gentle horse belonging to the plaintiff, said horse then and there became and was scared and frightened by said steam roller, and made wholly unmanageable, whereby said carriage was overturned and the plaintiff thrown violently to and upon the ground, whereby the plaintiff was greatly hurt, bruised, cut and wounded, and became sick, sore, lame and disordered, and was put to great expense for nursing, medical attendance and medicines, and was seriously and permanently injured physically and mentally, and suffered, and still suffers, and is likely in the future to suffer, great pain and injury, and whereby also the plaintiff was permanently hindered and prevented to a great extent from transacting and attending to his necessary and lawful affairs, and permanently hindered and prevented to a great extent from practicing his said profession as aforesaid, and from gaining large profits incident thereto—all to the damage of the plaintiff in the sum of twenty-five thousand dollars ($25,000.00), wherefore he brings his suit.

And the plaintiff claims in this action the sum of twenty-five thousand dollars ($25,000.00), besides costs of suit.

A. S. WORTHINGTON,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

A. S. WORTHINGTON,
Attorney for Plaintiff.

7 *Defendant's Plea, "Not Guilty."*

Filed February 10, 1898.

In the Supreme Court of the District of Columbia.

HOSEA B. MOULTON
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 41837.

And now comes the defendant, The District of Columbia, by its attorneys, and for plea to the declaration filed in the above-entitled cause, and each count thereof, says:

It is not guilty in manner and form as alleged.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Defendant.

Replication.

Filed February 11, 1898.

In the Supreme Court of the District of Columbia.

HOSEA B. MOULTON
vs.
THE DISTRICT OF COLUMBIA. } No. 41837. At Law.

The plaintiff joins issue upon the defendant's plea filed in the above-entitled cause.

A. S. WORTHINGTON,
Attorney for Plaintiff.

To Messrs. S. T. Thomas and A. B. Duvall, attorneys for defendant:

Please take notice that the issue joined in this cause will be tried at the next term of this court.

A. S. WORTHINGTON,
Attorney for Plaintiff.

Order to Enter Suit to Use of Wm. Oscar Roome.

Filed April 14, 1899.

In the Supreme Court of the District of Columbia.

HOSEA B. MOULTON
vs.
DISTRICT OF COLUMBIA. } No. 41837. At Law.

The clerk will enter this suit to the use of William Oscar Roome.

A. S. WORTHINGTON,
Attorney for Plaintiff.

8 *Memorandum.*

April 14, 1899.—Verdict for plaintiff for $6,450.00.

Supreme Court of the District of Columbia.

SATURDAY, *April* 29, 1899.

Session resumed pursuant to adjournment, Mr. Justice Hagner, presiding.

HOSEA B. MOULTON, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } No. 41837. At Law.

This cause coming on to be heard upon the defendant's motion for a new trial herein, and the same having been heard, it is considered that said motion be, and the same is, hereby overruled, and judgment on verdict ordered. Therefore it is considered that the plaintiff recover of the defendant the sum of six thousand four hundred and fifty ($6,450.00) dollars, for his damages as aforesaid assessed, together with his costs of suit, and have execution therefor.

Order for Appeal and Citation.

Filed May 1, 1899.

In the Supreme Court of the District of Columbia, the 1st Day of May, 1899.

MOULTON
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 41837.

The clerk of said court will please enter an appeal from the judgment rendered in above cause to the Court of Appeals of the District of Columbia, and also issue citation.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Defendant.

In the Supreme Court of the District of Columbia.

HOSEA B. MOULTON, to Use of WILLIAM Oscar Roome, vs. THE DISTRICT OF COLUMBIA. } At Law. No. 41837.

The President of the United States to Hosea B. Moulton, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docket-
9 ing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office, supreme court of the District of Columbia, on the 1st day of May, 1899, wherein The District of Columbia is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 1st day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN R. YOUNG, *Clerk.*

Served copy of the within citation on within-named appellee May 1, 1899.

AULICK PALMER, *Marshal.*

Supreme Court of the District of Columbia.

MONDAY, *May* 29, 1899.

Session resumed pursuant to adjournment, Mr. Justice Hagner, presiding.

HOSEA B. MOULTON, Plaintiff, vs. THE DISTRICT OF COLUMBIA, Defendant. } No. 41837. At Law.

Upon motion of defendant to extend time within which to file a transcript of record in this case, in the Court of Appeals, it is considered that the time within which to file said transcript be, and it hereby is extended for the period of twenty days from this date.

Supreme Court of the District of Columbia.

THURSDAY, *June* 1, 1899.

Session resumed pursuant to adjournment, Mr. Justice Hagner, presiding.

HOSEA B. MOULTON, Plaintiff, vs. THE DISTRICT OF COLUMBIA, Defendant. } No. 41837. At Law.

Now again comes here the defendant by its attorney, and tenders

to the court its bill of exceptions taken during the trial of
10 this case, and prays that it may be duly signed, sealed and made part of the record, now for then, which is accordingly done.

Defendant's Bill of Exceptions.

Filed June 1, 1899.

In the Supreme Court of the District of Columbia.

HOSEA B. MOULTON
vs.
THE DISTRICT OF COLUMBIA. } No. 41837. At Law.

Be it remembered that at the trial of this cause on the 14th day of April, A. D. 1899, before the Honorable A. B. Hagner, associate justice of the supreme court of the District of Columbia, and a jury regularly empaneled to try the issues joined between the plaintiff and the defendant herein, the plaintiff to maintain and prove the issues on his part joined, gave evidence by Wyman L. Cole, tending to prove that in 1896, at the time of the accident complained of, he resided at 1537 Park street, Mount Pleasant in the District of Columbia, his residence being a little to the east of Pine street, perhaps one hundred feet; that he remembers the accident, but cannot fix the date; it was several years ago, and was on Thanksgiving day; that there was a steam roller standing in the street there for a day or two nearly in front of witness' house, a little to the east of his house and near the corner of Pine street, about in front of Mr. Emrich's house at the corner of Park and Pine streets. That this steam roller was on Park street on Thanksgiving day until after witness had gone to his office that morning, but was not there in the afternoon; that it was covered with a white canvass; the roller had been on that street for several days prior to that time; that they were resurfacing the street with macadam, and witness had seen the roller in that position there from at least one to three days, that it was such an object as would be likely to frighten a horse; that witness had driven by it two mornings; and that it had frightened his horse; that whenever witness saw the roller it was at rest, and about same position as at time of the accident, and he never saw it in motion; that at that point Park street is forty feet wide from building line to building line, there being about six feet of pavement on each side of the street; the street proper is twenty-eight feet. The roller was on the south side of the roadway, and about as close as it could be driven to the sidewalk; that if
11 any one was driving along Park street, coming west from Fourteenth street, approaching this roller he might have turned down Pine street, and have avoided it, the roller was standing about the width of Mr. Emrich's lot or fifty feet west of Pine street. Pine street was traveled with teams, but was not macadamized or graveled; that when the witness returned home on Thanksgiving day about five or six o'clock, the roller had been removed.

To further maintain the issues on his part joined, the plaintiff testified in his own behalf that Thanksgiving day, November 26, 1896, about three o'clock in the afternoon, he went out for a drive; that the vehicle was a high trap without a top, and he sat in front driving, and on the same seat with him was his wife with her little child, and in the rear seat his wife's sister and her child, and his wife's mother; that about half past three o'clock they reached the vicinity of Park and Pine streets; that at this time it was broad daylight; that he drove out Fourteenth street to Park street and turned into Park street going west, and drove along quietly, his horse going at a jog; that he saw in front of him a steam roller of usually large size; that there was something thrown over a portion of it; that he had handled the horse he was driving for years, and in his judgment it was as safe and good a carriage horse as could be had; that he had driven by steam rollers when they were in motion with this horse time and time again, when they had steam up; that as he approached this machine, his horse pricked up his ears, as a horse naturally would, but witness did not discover that he was unmanageable until he approached the lines of the intersecting streets; that when he reached the east line of Pine street, for some reason, the horse there seemed in a moment or two to become intensely frightened, either because of the flapping of the canvass on the roller, or from some other cause. The machine sat about the middle of the carriageway, on the south side of the street; that he was guiding his horse between the roller and the curb to the right, going west, and when he got up just perhaps in *the* about the middle of Pine street of this cross-street his horse became unmanageable, and reared on his hind feet; that he then saw that his horse was badly frightened and that he could not go by the machine; that there was then but one thing to do, but the horse gave him no chance to go back, or to turn and go down Pine street, he was rearing and backing, he rushed back and seemed to swing around; that under ordinary circumstances he might have turned around, but the horse sprang and gave a jump and swung around, and he realized that he had to control the horse or that he would be smashed up, and just at that moment when the carriage was
12 turned round one of the wheels was crushed under it, and the last that he remembered about the fall, was that the carriage was going over; that he had had this horse about three years, and had always driven him himself, and had never met with any accident; that at the time of the accident complained of the machine was about fifty feet west of Pine street on Park street; that on the north side of Pine street, between the machine and the sidewalk, there was sufficient space to drive by ordinarily, about ten or twelve feet; that the machine was an unusually wide one, and of an old pattern; that he saw no watchman there guarding the machine, but he saw two men over on the sidewalk; that he had no warning from anybody of any kind, and no one came to him and touched the bridle of his horse, or spoke to him at the time. The only one who spoke to him at all was his wife, who said, "I think you had better turn back." The witness gave further evidence

tending to show the nature and extent of his injuries and sufferings.

Whereupon Dr. J. T. Winter and Dr. Daniel W. Prentiss gave evidence on behalf of the plaintiff, tending to show the extent of the injuries and sufferings sustained by him as the result of the accident complained of.

Whereupon Sidney M. Dunbar, a witness for the plaintiff, also gave evidence tending to show the nature and extent of the injuries and sufferings sustained by plaintiff, she being a trained nurse, and in attendance upon him.

Whereupon Evelina Turnburke, a witness for the plaintiff, gave evidence tending to show that she is a sister of the plaintiff's wife and on the occasion of the accident was with them in the trap, occupying the back seat on the right side going west; that the plaintiff called for her about half past three o'clock, after dinner; that plaintiff was with his wife, who held her child, sat on the front seat; that they drove out Fourteenth street and turned into Park street and went along pleasantly; that in driving down Park street witness, from where she sat, saw the steam roller about in the middle of the street; that as they approached the roller the horse became very much frightened, and seemed unmanageable, and just at that moment it seemed as though Mr. Moulton would lose control of him, and witness was getting frightened more and more all the time, as they had their children with them; that Mr. Moulton tried to control the horse, that seemed so terribly frightened; *this* steam roller had a canvass on it, and the wind was blowing, and the wind blowing the canvass frightened the horse. The horse seemed to become unmanageable and as we drove on Mr. Moulton
13 tried to control the horse—he spoke gently to him, and just at that moment no one came to our assistance, no watchman, and just at that particular time Mr. Moulton tried to turn, and the horse reared and plunged, and in turning we went over; that the roller was about in the middle of Pine street, about fifty feet west of Pine street; that we had not reached Pine street when witness first saw the roller; that we had reached Pine street when the horse first showed symptoms of fright, and Mr. Moulton tried to control him, but the horse was terribly frightened in the beginning; Mr. Moulton did not strike the horse with a whip, but tried to urge him by; witness could not say after all that Moulton did try to urge him; that he tried to control him; that the whole thing took place in thirty or forty seconds; that the horse was badly frightened and Mr. Moulton did not have a chance to do anything at all; that he had no opportunity to do anything by way of coaxing or otherwise, that up to the time the horse plunged and turned around Mr. Moulton did not make any effort to turn down Pine street, or to go back; at that time he did try to turn around and was upset. There was another horse attached to a buggy which came along plunging and frightened after the accident, and some one went to the assistance of this 2d horse, which was rearing.

To further maintain the issues on his part joined the plaintiff offered as a witness, Joseph F. Vanfleet, who gave evidence tending

to show that on the day of the accident he was on Park street with his wife, both of them riding bicycles, in the rear of the conveyance driven by the plaintiffs; that they were going west a little in the rear of the plaintiff's vehicle, and noticed his carriage in front of them, about fifty or sixty feet; they were all going in the same direction and as witness looked up he noticed a steam roller in Park street. Mr. Moulton was driving his horse on a little jog; that as the witness noticed plaintiff's carriage he saw the plaintiff pull to the right; the roller sat up apparently about the middle of the road. It is a peculiar road along there, it kind of sags down on each side, and the plaintiff turned to the right to go by the roller, and the witness noticed the horse commence to rear and plunge and continue a little further, but not very far; witness noticed the plaintiff pulling on the reins, and the horse was getting very much frightened at that time; it was all in a moment almost, and as he did so the horse plunged right back and turned and almost instantly the carriage was thrown over and everybody was thrown out on the right side of the road; that witness came up immediately to their assistance, and did not see any watchman in
14 the street at all; and no one took hold of Mr. Moulton's horse or gave warning to him with reference to the roller. The plaintiff was in such a position with reference to the roller as to have seen it. Before witness left that neighborhood, a man and a woman came along in a buggy, and witness told the young man about the accident, and that he had better look out; the man tried to force his horse by, and a colored man came out and took the horse by the head and led him by. The roller was as near, as witness can recollect, in the center of the road, sitting on the south side of the road, facing east and west, and the smokestack in the center; that Mr. Moulton did not use any more than the ordinary force to go by after he found his horse was frightened; that he attempted to turn to the left, but the horse at that time was in an unmanageable state and reared and plunged right back, and as he did so the accident occurred; that the plaintiff could not have gone over ten or fifteen feet toward the roller after the horse first showed fright; that Park street was what you would call a macadam road; that there were no barricades or danger signs in Park street on that occasion.

To further maintain the issues on his part joined the plaintiff offered as a witness Mrs. Georgia D. Vanfleet, who gave evidence tending to show that she was with her husband, the preceding witness, on the day of the accident; that they were riding on their bicycles; and in the neighborhood of four o'clock they turned in on Park street from Fourteenth street, and were riding along quietly; there was a carriage some distance ahead, and everything seemed to be peaceable and quiet; just ahead of the plaintiff's carriage witness noticed a steam roller or crusher; the plaintiff's horse was proceeding quietly until he came within a short distance of the roller, about fifty feet, when the horse seemed as though he was frightened, and did not care to go by, and with that the horse reared on his hind legs, and seemed to have a tendency to come

backwards, and with that there was a crash, and the wheel was dished under the buggy; that Park street there is not like a concrete street; the roadway is very much higher than the gutter; that the roller was not a concrete roller; it seemed to be a very huge machine; it had an immense stone wheel in front, and a big iron wheel in the rear, and was used in crushing down the rock to make a smooth road; that the bed of the road is fully nine inches higher than the gutter. That after the accident to the plaintiff there was another man came along there and his horse did not seem inclined to go by, but a man came up to him and led him by. No one warned Mr. Moulton.

To further maintain the issues on his part joined the plaintiff offered as a witness Sarah Woodland, who gave evidence tending to show that she was a servant, employed by Mrs. Miller at her house on the southeast corner of Pine and Park streets in Mount Pleasant; that on the day of the accident she was in the kitchen eating her dinner, when she heard a terrible crash, and the minute she heard it she knew that something had happened, because she had seen so many horses frightened by the roller as they passed by there; that she ran out into the street and when she got there the three ladies, the children and Mr. Moulton were lying on the ground; that she had seen horses frightened by the roller on Wednesday morning, and on Thursday morning also, more than once; that they had been using this roller there all that week; that they would bring it there and use it a while, and take it away and bring it back; that they brought it back on Wednesday morning when it broke down; that she could not tell what time Wednesday morning it broke down; and they took it away Thanksgiving evening; it was hauled away by horses; that she had seen several horses frightened by it on Wednesday and several on Thursday—that all the horses that went by it showed fright; that after the accident, witness saw one horse led by, but none were led by before the accident; that she had seen a number of people go down Pine street, and it was a physical impossibility for Mr. Moulton to have gone down there.

To further maintain the issues on his part joined, the plaintiff offered as a witness Mr. William E. Saunders, and Raymond W. Moulton, who gave evidence tending to show the nature and extent of the plaintiff's injuries and sufferings.

To further maintain the issues on his part joined, the plaintiff offered as a witness George N. Emmerich, who gave evidence tending to show that he was sitting at the window of his house on the southwest corner of Pine and Park streets in Mt. Pleasant, when the accident to the plaintiff happened; that he heard the crash of the vehicle as it turned over, but did not see the accident until the crash came; that there is a lamp post on Park street four or five feet east of Pine street, and it was right at this lamp post; that the carriage turned over, and about two feet east of the lamp post; that he observed the course the carriage had taken in turning by the impress of the wheels in the street; the carriage came up Park street nearer the north curb line of Park street just before it made a turn, and

then from the sliding motion of the wheel or rather the tracks indicated it, and the carriage then made a very abrupt turn, and it was facing west and turned towards the east almost making a circle in front of this lamp post; that these wheel tracks were
16 about opposite the center of Pine street; that he observed the roller standing in Park street on Thanksgiving day, and part of the day previous; that this roller was a very large one and appeared to be of a very obsolete pattern, two wheels in front, and two behind; the front wheels were about five feet west of the premises of the witness; that his premises are thirty-five feet front, and the curb line of Pine street is about six or eight feet east of witness' east line, that would make it about fifty feet west of Pine street; that he observed the roller prior to the accident to the plaintiff on Thanksgiving day, and noticed that almost every team that passed by there had become frightened, the horses shied when they saw it; that the witness only knows of one horse going by there without showing fright, and he saw at least a dozen go by. Witness saw a watchman there, but did not see him warn any one.

To further maintain the issues on his part joined, the plaintiff offered as a witness Mary Saunders, who gave evidence tending to show that she was in the vehicle at the time of the accident, being the mother-in-law of the plaintiff; that the horse became very unmanageable, pitching and plunging, and Mr. Moulton was trying to hold him, and the next she knew they were turned over; the carriage only went a very short distance after the horse showed signs of fright, and Mr. Moulton tried then to soothe and keep him quiet; that is all she saw; that the plaintiff did not try to go by; that they had no warning from anybody, and no one came out to assist them in the management of the horse.

The plaintiff to further maintain the issues on his part joined, offered as a witness Randall Saunders, who gave evidence tending to show the extent of the plaintiff's injuries and sufferings.

The defendant to maintain the issues on its part joined, offered as a witness Arthur C. Thomas, who gave evidence tending to show that he was employed by the District of Columbia as engineer of steam rollers, and that he was in charge of the steam roller that was being used on Park street; that this was the kind of roller that was usually used in constructing macadamized and gravel roads; it had three wheels, the tread of the rear wheel being about five feet; that the back wheel was wider than the front wheel; that it was about five feet in its extreme width; that roller was about eight feet long and about five or six feet high; that the smokestack was a little higher than the other part of the machine and the roller was propelled by steam power; that the roller had only been on Park street since 10 o'clock the morning of the accident to the plaintiff; that the machine had been here on the day previous to the accident, but had been taken and used on Yale street and Harvard
17 street, where it had remained over night, and had been brought back to Park street on Thanksgiving day, the day of the accident, and had only been there about an hour when it broke

down; and then witness placed it as near the curb as possible, and left it in that position.

Whereupon to further maintain the issues on its part joined, the defendant offered as a witness James L. Calhoun, who gave evidence tending to prove that at the time of the accident he was foreman for the District of Columbia in the street-surface department; that the steam roller in question was under his charge on the day of the accident, and the machine broke down on that day, and when it broke down he left it in charge of Mr. Goheens, the watchman, with instructions to warn people in order to prevent danger to those who drove by there; and that on the day before the accident he had had orders to send the roller up to Park street.

To further maintain the issues on its part joined, the defendant offered as a witness E. H. Collins, who gave evidence tending to show that he was in the employ of the District of Columbia at the time of the accident complained of and was in charge of repairs on Park street at that time; that he thought the steam roller in question had been brought to Park street only on the morning of the accident, and had not been there over night, but that witness was not there; that Mr. Calhoun was foreman in charge of the machine; that the work carried on there was regravelling Park street; that this machine was the ordinary steam roller necessary for such work, and that it was propelled by steam.

To further maintain the issues on its part joined, the defendant offered as a witness John W. Jennings, who gave evidence tending to show that he resides on Park street about two hundred and fifty feet west of the intersection of Pine street, and remembers the occasion of the overturning of the plaintiff's carriage on Park street; at the time the witness was on Park street coming up from Fourteenth street, and was about 150 or 200 feet behind the plaintiff's carriage at the time he noticed the accident; that the plaintiff's carriage passed witness about 250 feet before it got up to the place of the accident; that there was a steam roller at the time standing on Park street, about sixty feet west of the place of the accident, and about twenty or thirty feet west of Pine street; that improvements or repairs had been going on in the roadway of Park street at that time for about a week or so, and this roller had not been there all the time, but had been brought there off and on; that as far as witness knew the roller had never remained there over night but that he could not say whether roller had been there all night or not; that witness first saw the plaintiff's horse shy about forty or fifty feet east of Pine street and then go about the length of this (meaning the court) room; and it looked as if the plaintiff was urging his horse on, coaxing it along, but witness cannot say that the plaintiff whipped the horse at all; and cannot say that plaintiff did any urging; that he then saw the plaintiff turn his horse as if to go into Pine street, not to go into Pine street, but that way, at that time the horse backing and in backing the vehicle turned over; that as far as witness saw there was no cover on the roller in the street; that this roller could have been seen in the street as far east as Fourteenth street, a distance of from six to eight

18

hundred feet; that horse went a little distance toward the roller after he first shied. That witness did not see any one warn plaintiff or offer to lead his horse by.

To further maintain the issues on its part joined, the defendant produced as a witness Edwin M. Jett, who gave evidence tending to show that there was no covering or anything over the steam roller at the time of the accident; that steam was not up; that there was a man there in charge of the roller; that this roller never remained in Park street over night, to knowledge of witness, who was unable to remember just when he went on his beat on the night before the accident; that witness saw the machine on Park street about four-fifteen*th* o'clock the day of the accident.

To further maintain the issues on its part joined, the defendant offered as a witness John Robinson, who gave evidence tending to show that he was a laborer in the employ of the District and on Thanksgiving day, the day of the accident to the plaintiff he came down Princeton street to go to Park street, and when he got down there he met a gentleman driving up with a black horse with three ladies in the carriage; that this was near about five o'clock; that he had stopped work and come down Park street, and saw the watchman there in charge of the roller; that the plaintiff came up with his horse and carriage and the horse got more frightened the closer he got to the steam roller, and that the gentleman in charge of the horse brought the reins down on the horse and kept driving towards the machine and the horse stopped three times, and after the horse got to such a distance he looked around and saw the machine again, and then the watchman went and seized the horse, but witness heard him say nothing, and the gentleman shook his head and told him to let him go, and the horse turned and sawed and reared and turned the carriage over, and that horse was not badly frightened until he suddenly turned around, and witness then ran to the carriage and lifted it up; that the plaintiff's horse was about a hundred yards east of Pine street, and shied, but the gentle-
19 man pulled him in, and wanted him to go by the roller, but the horse did not want to go that way and in turning it broke the wheel down, and then the people in the carriage were pinned all right up against the curb.

To further maintain the issues on its part joined, the defendant offered as a witness Frank A. Goheens, who gave evidence tending to show that he remembers the day of the accident very well, and at the time was watching the steam roller in question on Park street; that the roller had just been brought there that day at about four p. m.; and it broke down at about four-ten p. m.; and it broke down in the afternoon about an hour prior to the accident; that it broke down about fifty feet from Pine street; that the witness with the roller got to Park street at three p. m. when it broke down; that they drove it up as close as they could to the curb and left it, about a foot and a half from the curb on the south side; that he remembers the accident to the plaintiff that happened there, and he was standing at the time right by the engine; that he noticed the plaintiff's carriage coming on the other side of Pine street, and

offered to assist him by the roller, that witness walked right up on the other side of the street, and offered to put his hands on the reins of the horse, but the plaintiff said, "No, I will drive this horse, I guess I am capable of driving it," and witness said all right, and walked back and stood with his back up against the boiler of the engine, and just as quick as that (indicating) the horse turned right around and threw the plaintiff out, and witness ran there and this old man Robinson went up there and we helped him; that when witness first noticed the plaintiff's carriage it was on the east side of Pine street, about sixty feet, and the plaintiff had plenty of room to go around after witness offered his assistance, which was declined; that the driver of the horse did not do anything at all, only to just take the reins in both his hands, and hit the horse, and said, "I will drive this horse by there," and just as he did that the horse took a short turn and threw them out, and when witness went to the assistance of the plaintiff the horse was just pricking up his ears and looking at the roller; that there was no steam or fire in the roller and thereupon the defendant rested.

The foregoing being all the evidence as to the nature and circumstances of the accident to the plaintiff.

The plaintiff requested the court to instruct the jury as follows:

1.

The jury are instructed that if they find that the steam roller referred to in the evidence was allowed by the defendant or its agents to stand on Park street a short distance west of Pine street on the 26th day of November 1896, prior to the occurrence of the accident in which the plaintiff was injured on that day; that said steam roller so standing at that place was an object likely to frighten reasonably gentle horses properly handled going along said Park street; that the plaintiff's horse was a reasonably gentle horse, and that at and before the occurring of the accident in question it was prudently and carefully handled and managed; that the overturning of the vehicle in which the plaintiff was riding at the time in question was not the result in any part of contributory negligence on the part of the plaintiff; and that the defendant or its agents in charge of said steam roller negligently allowed said steam roller to remain at said point for an unreasonable length of time without taking reasonable precautions to avoid the occurrence of accidents from the frightening of horses by said steam roller, and that the overturning of said carriage was caused solely by such negligence on the part of the defendant or its agents in charge of said roller, then their verdict should be for the plaintiff.

Granted.

2.

The jury are instructed that if they find from the evidence that the plaintiff's horse was frightened at the steam roller and in consequence became unmanageable the moment or almost immediately before the accident occurred, the law does not require in order to free him from the charge of contributory negligence that it should

appear he pursued the safest and best course in what he did to avoid having his vehicle upset. Even if the jury should find from the evidence that in the presence of sudden and imminent danger the plaintiff made a mistake in not stopping at the first indication of restiveness on the part of the horse he was driving, or in not endeavoring to turn round and go back on Park street, they would not be required to find from those facts alone that he was guilty of contributory negligence. To reach that conclusion they should further find that an ordinarily prudent and careful man under like circumstances would not have acted as Mr. Moulton did.

Granted as amended.

3.

The jury are instructed that if their verdict be for the plaintiff, they should allow him: first, reasonable compensation for the physical pain and mental anguish which he has sustained in
21 the past and for that which the jury may find from the evidence he is likely to endure in the future, as the direct result of the injuries received by him at the time of the accident in question; and, second, the amount of pecuniary loss, if any, which the jury may find from the evidence he has sustained in consequence of said injuries by being rendered less able to earn money in the practice of his profession, and also such pecuniary loss of the same kind, if any, as the jury may find from the evidence he is likely to sustain from said cause in the future.

Granted.

And hereupon the defendant requested the court to instruct the jury as follows:

2.

If the jury believe from the evidence that the plaintiff by his own negligence directly contributed in any degree to the injury complained of, they should find for the defendant.

Granted by consent.

3.

The jury are instructed that the defendant is not an insurer against accidents upon its streets, and it can be held liable in this case only upon proof of negligence as alleged in the plaintiff's declaration.

Granted by consent.

4.

The burden of proof is upon the plaintiff in this case to show by a preponderance of the evidence that the accident whereby he was injured was the result of negligence on the part of the defendant as alleged in his declaration, and if the jury find that such evidence is consistent equally with the existence or non-existence of such negligence on the part of the defendant, the plaintiff cannot recover and the verdict should be for the defendant.

Granted by consent.

5.

If the jury believe from the evidence that the plaintiff by the exercise of such care, prudence and caution as a reasonably prudent person would have exercised under similar circumstances, might have avoided the injury complained of, then he cannot recover, and the verdict should be for the defendant.

Granted by consent.

6.

The jury are not at liberty to presume negligence on the part of the defendant from the mere happening of the accident complained of.

Granted by consent.

22

7.

If the jury believe from the evidence that the steam roller on Park street referred to in the evidence was disabled either on Thanksgiving day, 1896, or the day before, and that the defendant removed it late in the afternoon of Thanksgiving day, then the jury are instructed that that was not an unreasonable time for said roller to remain on Park street, and that its so remaining there would not constitute negligence on the part of the defendant.

Refused.

8.

If the jury believe from the evidence that the plaintiff saw the steam roller in Park street in time by the exercise of reasonable care, to have avoided the accident, then it is immaterial whether the defendant displayed any warning sign to indicate the presence of the roller, or whether the street was barricaded so as to prevent travel over it at the point where the roller stood.

Refused.

9.

The jury are instructed that it is the duty of the defendant to keep its streets and roads in repair and convenient for travel, and if they believe from the evidence that the steam roller mentioned in the evidence was at the time of the accident to the plaintiff upon Park street for the purpose of being used in the work of repairing that street; then the said roller was in no sense a defect or obstruction and if the plaintiff saw it in time to have avoided it by going down another street, but instead thereof attempted to pass the roller and in so doing his horse became unmanageable and overturned the carriage and threw the plaintiff out, then he was guilty of negligence, and is not entitled to recover and their verdict must be for the defendant.

Refused.

10.

If the jury believe from the evidence that the plaintiff's horse or carriage did not come in contact with the steam roller on Park street, but that the horse was frightened by it, became unmanage-

able, and overturned the carriage at a point in Park street, some distance from the roller, where the street was safe, then the plaintiff is not entitled to recover and their verdict must be for the defendant.

Refused.

23 11.

The jury are instructed that there can be no recovery on the first count of the declaration.

Refused.

12.

The jury are instructed that there can be no recovery on the second count of the declaration.

Refused.

13.

The jury are instructed that there can be no recovery on the third count of the declaration.

Refused.

14.

The jury are instructed that there can be no recovery on the fourth count of the declaration.

Refused.

1.

The jury are instructed that upon the whole evidence in this case the defendant is not liable, and their verdict should be for the defendant.

Refused.

And hereupon the court of its own motion addressed the jury as follows:

By the COURT:

GENTLEMEN: I will read to you the instructions at the request of the plaintiff and the defendant that the court has granted, and I shall make a few remarks, if I conceive it important to explain the meaning of some of these instructions.

The first instruction asked in behalf of the plaintiff, and granted by the court, is:

The jury are instructed that if they find that the steam roller referred to in the evidence was allowed by the defendant or its agents to stand on Park street a short distance west of Pine street on the 26th day of November, 1896, prior to the occurrence of the accident in which the plaintiff was injured on that day; that said steam roller so standing at that place was an object likely to frighten reasonably gentle horses properly handled going along said Park street; that the plaintiff's horse was a reasonably gentle horse, and that at and before the occurring of the accident in question it was prudently and carefully handled and managed; that the overturning of the vehicle in which the plaintiff was riding at the time in

question was not the result of any part of contributory negli-
24 gence on the part of the plaintiff; and that the defendant or its agents in charge of said steam roller negligently allowed said steam roller to remain at said point for an unreasonable length of time without taking reasonable precautions to avoid the occurrence of accidents from the frightening of horses by said steam roller, and that the overturning of said carriage was caused solely by such negligence on the part of the defendant or its agents in charge of said steam roller, then their verdict should be for the plaintiff.

I would remark in reference to this instruction that it recognizes the law to be that a recovery in case of injury such as is complained of here, is not confined to injuries, which occur from actual contact with a vehicle or obstacle that happens to be in the street, but that the right to recover would include injuries caused by the fright of horses from the presence of obstructions in or near the street likely to frighten a reasonably gentle horse properly driven. It is therefore not essential that you should find there was any contact on the part of this vehicle with the roller itself; but if the roller was the efficient cause of the fright of the horse, then that under the circumstances spoken of would be the efficient cause for recovery.

Again: This instruction tells you as a matter of law, that it is for you to find whether the roller which it is alleged frightened this horse was a machine likely to produce that effect upon such a horse; and in deciding this question you may consider various portions of the testimony; for example that many horses that day were frightened by the presence of the roller, and the witnesses on that subject are Cole, Williams, Emmerich, Van Fleet, and his wife, and there may have been some others. Constituting the direct testimony delivered before you of persons who saw horses frightened by the roller.

Again: You are justified in taking into account the circumstances that the agents of the District recognized this to be a source of danger by the fact that they required the watchman to remain near it to prevent accidents and to give notice. The witnesses on that subject are Thomas and Calhoun. Mr. Thomas said when he left the machine he pulled the fires out, and instructed the man in charge to look out for the teams passing, and to lead them by. Calhoun said that he a received a message from some one that the machine had broken down, and that he sent a man to warn people on Park street.

Now, the important question is, were the authorities observant of their duty, in giving such warning and insuring the safety of passers-by.

It is in evidence that the street was not barricaded either by beams or by ropes such as we sometimes see; or by a notice
25 of a danger, such as we constantly see at places where operatives are at work. Either of these warnings afford in fact a guarantee that there will be no danger there; so long as they are retained there until all source of danger had disappeared.

It may inconvenience people, if a portion of the street, for a square or two is actually blocked, but it is a great deal better that should

result, than that injury or death of people may be caused by neglect to provide them.

One or two of the witnesses, one certainly, was asked about this danger signal, whether it was given, and they said no; that they never used it, except on asphalt pavements; but that on country roads they thought the common sense of people would be sufficient to protect them. Now neither of those steps were taken.

But were there steps taken—which Calhoun and Thomas both seemed to have considered necessary—by insisting that the watchman should be there to give notice? Was notice given. That is a matter in dispute, and it is for you to decide on that subject. It is insisted on the part of the District there were people placed there for that purpose, and that with reference to this particular carriage, actual notice was given. Robinson and another witness both testified that one of them offered his services—one declared he himself offered his services, and was told, if not by words from Mr. Moulton, yet that he shook his head, but indicated to him that he did not want his aid. And he would attend to that matter himself. And Robinson said precisely the same thing. Nobody else so far as I recollect said that any person did come up and take hold of Moulton's bridle. Moulton positively denies it; the mother-in-law denies it; and the sister-in-law denies it. Van Fleet and his wife say they saw no such thing; and I believe all the persons who were present disclaim having seen anybody come up there. The last gentleman who was examined on behalf of the District when he was recalled said that he saw nobody come to take hold of the bridle of that horse to prevent it from passing, or to lead it by in safety. He was asked, however on the part of the District, which side of the street he was on, and he answered that he was on the north side, and it was insisted a person might have come from the south side, and these witnesses had offered though observed by him, as he was on the north side, and they the view of the witnesses might have been obscured by the horse intervening. It is for you to determine whether there was any such interference of the part of any agent of the District of Columbia to carry out the orders which Thomas and Calhoun had enjoined upon them to save persons from injury.

26 Where there is a direct conflict of evidence the better way is to endeavor to reconcile the warrant statements. Van Fleet and his wife both said that immediately after this occurrence and the horse came from the same direction, and that a man did go there and lead that horse by. As — is nothing to show that either of the employees of the District had ever seen Moulton's horse before, or were acquainted with any of the parties, it may well be then that when they were speaking of leading a horse by, they may have been confounding the horse spoken of by Van Fleet with the horse of Moulton.

But if you believe that no such attempt was made or carried out on the part of those two witnesses, then one of the postulates of this prayer has been complied with, that is to say that the defendants or its agents in charge of said steam roller negligently allowed said steam roller to remain at said point for an unreasonable length

of time without taking reasonable precautions to avoid the occurrence of accidents from the frightening of horses by said steam roller.

The next question which is referred to in this instruction is whether Moulton was guilty of contributory negligence in connection with the accident.

The fact that his horse was an amiable horse does not seem to be disputed. Moulton said that he had been driving him for years. Now did Moulton manage him properly? That again is a matter for you to determine. You no doubt many of you are able to add to the testimony here of your own knowledge on the point; although you are to be governed by the testimony which was delivered here.

The case on the part of the defendant is that Moulton, when he was far enough off to have controlled his horse, by turning him in a safe direction, determined that he would go through; and according to the testimony of Robinson, he smacked the horse with the reins several times, and insisted upon his going on, and made no effort to do anything except to force him by. Moulton says that he was going from an easterly direction the distance from 14th street where the drug store was, to the place where the accident occurred, being 90 or more; that when he got some distance from the east line of Fi. street, he observed his horse had noticed this roller, and that he noticed it at the same time that the horse noticed it. Perhaps the horse's ears showed that. It was the duty of Moulton at that moment while it was in his power, to turn the horse in a safe direction, or certainly to have abstained from pressing him further in that direction.

In reference to that point, I have granted this the second instruction offered by the plaintiff with an amendment to the effect,

27 That if you find the plaintiff's horse was frightened at the steam roller, and in consequence became unmanageable the moment or almost immediately before the accident occurred, *it or almost immediately before the accident occurred*, the law does not require in order to free him from the charge of contributory negligence, that it should appear that he pursued the very safest and best course to avoid having his vehicle upset, but that you should find that he did the very best thing that was possible.

Even, you should find that in the presence of sudden and imminent danger the plaintiff made a mistake in not stopping at the first indication of restiveness on the part of the horse he was driving, or in not endeavoring to turn around and go back on Park street, they would not be required to find from those facts alone that he was guilty of contributory negligence. To reach that conclusion they should further find that an ordinarily prudent and careful man under like circumstances would not have acted as Mr. Moulton did.

Now let us see what Moulton might have done. He had just come by a perfectly safe road from 14th street, some distance from the east side of Pine street. Now it may be said that instantly, as soon as he saw his horse's ears pricked up he might have turned right back. Yes, he might have gone right straight back; or, he

might have taken his horse out of the wagon; or he might have turned around into Pine street by bringing his horse a little nearer to the obstruction perhaps thirty feet nearer and then gone down Pine street. Whether his failure to do any one of these things amounted to contributory negligence on his part, is to be determined by answering the question whether what he did under all the circumstances was what a reasonable man would have done under the circumstances, was such a thing as a reasonable man would have done under the circumstances, one who knew enough about the care and management of horses, and what ought to have been done, in such an emergency, if he was mad and had determined to force his horse through reckless of consequences then his action in that respect would be such as would render him guilty of negligence. There are many conditions and contingencies of life in which there are several courses *are* open, either of which might be pursued. Of course, he did not want to go on Pine street. He wanted to go on Park street and it was the duty of the public to afford him a safe way along there, and if there was anything in the streets that the public had placed there, the effect of which would be to obstruct the way by coming in contact with his vehicle or to alarm his horse—it was the duty of these authorities who
28 were expending the money which Moulton and other taxpayers were paying to secure good order in the streets as well as in the roads to preserve him from danger while traveling on the street.

Now suppose he, Moulton, had tried to turn back at once. We all know that scared—high-spirited horses get frightened at very trifling things, which they have perhaps have seen before without being scared. This horse had been driven by one of these steam-engines before with the steam up and had not been scared, and many people had driven their horses by there that very evening, although they were scared, but they had gone by all right, and it is for you to determine whether under the circumstances it was essential for him to change his course at once or to try a little more before turning back. But when he found his wife appealing to him to go back he attempted to do so. Now, he had to choose between standing still, which the horse would not allow him to do and which he found he could not do with safety, or going back the way he came, which he knew was a safe way, because he had just come that way, or to go down Pine street. Suppose he had said I will go down Pine street he would — had to turn off—if he had been going down Pine street this accident would have happened because he turned in the middle of Pine street which was fifty feet wide and twenty-five feet would be about in the middle of that street it would equally have happened if he had then tried to go down Pine street, and it would have happened in just the same way. (Then what did he know about Pine street—one of the witnesses says it was open to business, but not to travel, and if we are to understand anything from that man's testimony it was that this was not a very good road for pleasure carriages and not passable for some others.) So it is in view of all these conditions you are to determine whether he acted

as a reasonable man would after coming upon this engine. If you find that he went a little nearer after the horse pricked up his ears as near as he could or as near as he thought he safely could do before he determined that he could not force the horse by and that he then turned and if that was the act of a reasonable man under all the circumstances then you would be justified in saying that there was no proof of contributory negligence on his part.

The third instruction granted on behalf of the plaintiff is on the measure of damages. The jury are instructed that if their verdict be for the plaintiff they should allow him first, reasonable compensation for physical pain and mental anguish which he has sustained in the past and for that which the jury may find from the evidence he is likely to endure in the future.

29 Mental anguish is a matter which is not easily to be understood, (but it may be a very serious thing for a man who has a family to support lying in bed thinking this may be the end of me and my family for the rest of our lives and that mental anguish is the sort of thing spoken of here). Any man that has the proper happiness in life wants to live; and to have the apprehension of death constantly hanging over him is the sort of thing meant by this mental anguish, and second, the amount of pecuniary loss which the jury might find from the evidence he has sustained in consequence of said injuries by being rendered less able to earn money in the practice of his profession and also such pecuniary loss of the same kind, if any, as the jury may find from the evidence he is likely to sustain from such cause in the future.

That explains itself sufficiently and as has been remarked to you it is almost impossible to put a price on this but that is left to you because one man is very much more apt to err than twelve. But what you have to do is to do justice to both parties in considering the subject.

I will state in connection with the testimony that there was some discussion as to whether or not it was essential for him to stop at once or to go right on (and it is for you to consider whether he was not authorized to believe that the defendant machine would have sufficient protection in the neighborhood of this roller to avert all danger, but it turns out that there had been according to the testimony orders for men to remain there and who were doing nothing there except drawing their pay and there is no reason on earth why they should not have obeyed their orders that was left for them to receive and which would have put a stop to all this injury). The remark was made as to whether or not the leaving of this roller in the street for the length of time whatever it was that it was not in itself proof of negligence. I say that under the circumstances and the dispute as to how long it was there, whether it was two days or only a part of one day I should not say as a matter of law one way or the other nor would I be justified in asserting it as a matter of fact—it is for you to determine that thing, whether it would be such negligence as to compel you to find negligence against the District of Columbia, and for such a length of time. (But if they left it there without having some one to give warning of it by night and

by day you would be justified in finding that that was negligence if it was such an affair as would cause fright to be given to horses passing there). What would be thought of the District leaving that there over night—a dark night without a lantern on it. Persons might run into it and lose their lives. That would be cul-
30 pable in the daytime in the same way with horses which are high-spirited. Then there should have been some one there to avert the danger. That is the conclusion of the District itself and the absence of such protection might under all the circumstances be considered as such negligence sufficient for you to find against them.

Now, I will read some prayers on behalf of the defendant—

First, as to the question of contributory negligence. It remains as a principle of law at this time although how long it will remain I cannot say. I cannot say whether it is a wise one. It is fixed that if there is any admixture of negligence on the part of the person who has been injured in the highway then he cannot recover. A man is run over by a street car and the man in charge of the street car is negligent, yet the man who has been injured he cannot recover, he has been negligent, and that is what is intended to be said here.

If the jury believe from the evidence that the plaintiff by his negligence directly contributed in any degree to the injury complained of they should find for the defendant.

And then we have here the fifth prayer which reads as follows:

If the jury believe from the evidence that the plaintiff by the exercise of such care, prudence and caution as a reasonable man would have exercised under similar circumstances might have avoided the injury complained of then he cannot recover and your verdict should be for the defendant.

Those are the two instructions upon that point. Then prayer No. 3 reads as follows:

The jury are instructed that the defendant is not an insurer against accidents upon its streets and it can be held liable in this case only upon proof of negligence as alleged in the plaintiff's declaration. It cannot be expected that the District will insure against every possible wrong. They are able to keep the streets clean only for a part of the time—they clean them say at five o'clock in the morning why by six o'clock filth has been dropped there and they are not negligent if in the meantime it has been placed there, but if they are not guilty of negligence then they should not be held, but if they are guilty of negligence then notwithstanding they are not insurers they can be held accountable. Their negligence however must be proved.

The sixth prayer is on the same subject. The jury are not at liberty to presume negligence on the part of the defendant from the mere happening of the accident complained of.

Of course not, otherwise it would be a very simple matter for a man to recover. He would simply have to come in court and say I was run over by a fire-engine; in order to be able to re-
31 cover,—but there must be proof and that is defined in the fourth prayer which is called the burden of proof.

The burden of proof is upon the plaintiff in this cause to show by a preponderance of the evidence that the accident whereby he was injured was the result of negligence on the part of the defendant as alleged in his declaration and if the jury find that such evidence is consistent equally with the existence or non-existence of such negligence on the part of the defendant the plaintiff cannot recover and the verdict should be for the defendant. You hear a great deal of the scales of justice being held perfectly even, so they should be, but there must be testimony to carry down one side of the scale or the other, and on the one side there must be a preponderance of the evidence. That does not mean a greater number of witnesses; but that your judgment must be convinced that the weight of the evidence is in favor of a proposition rather than against it, and before the plaintiff can recover in a case like this it implies that the weight of the evidence must be in favor of the plaintiff before he can recover.

It occurs to me that is all that is necessary for me to say to you after this very full and able trial of the case on behalf of counsel on both sides.

Mr. DUVALL: I desire to except to what your honor said in reference to Pine street and its situation and condition. You said all that we know about Pine street is what one of the witnesses said that it was a street not for ordinary carriage driving.

COURT: I did not say. I expect I said that is all that we know about the condition or the safety of it—that is what I meant to say. Is there anything else?

Mr. DUVALL: The testimony of Mr. Cole and Mr. Moulton himself and the testimony of pretty much all of the witnesses—they testified that Pine street was not only passable but was frequently used.

COURT: I said nothing inconsistent with that. I said as to the condition of it, How was it used? Was it a proper street for driving? However, gentlemen (to the jury), you have heard what the witnesses *said* have said and that is for you to determine. If you think the witnesses said anything in contradiction of that, you must be governed by the testimony. I have not given you my judgment to rely upon, that is for you. I have no recollection of anything being said as to the condition of the road, the bed of Pine street, except the one witness who said it was open for business, but not for travel.

Mr. DUVALL: Then I desire to except to the reference in the
32 charge of the item for recovery for mental anguish to a man who has a family to support. We object to that.

COURT: I have no correction to make to that, and the same thing if he has no family either, but more particularly if he has a family—mental anguish is a stumbling block to most juries. What is meant by that, pray?

Mr. DUVALL: And I object to the statements to the jury that the jury would be authorized to determine whether or not the plaintiff was not authorized to believe that the authorities had provided adequate safeguards to enable parties to pass through Park street.

(COURT: I say the jury are authorized to consider whether or not he might not have gone on through Park street under the belief—the justifiable belief—that since that roller was left there the authorities would have provided safeguards against such accidents as this.)

Mr. DUVALL: I desire to note exception to that.

Before the jury retired, the defendant, by its counsel, excepted severally and respectively to the refusal of the court to grant said several prayers of the defendant and to the refusal of the court to allow the same to be read to the jury and to the giving of the several prayers in behalf of the plaintiff. And the defendant further, by its counsel, duly and severally excepted to such parts of said charge as are contained within brackets and requested the justice to note said exceptions upon his minutes, which was done and the said counsel requested the court to sign & seal this its bill of exceptions, which is done now for then this 1st day of June, 1899.

A. B. HAGNER, *Justice.*

We consent to signing of this bill of exceptions; it is all right.

C. L. FRAILEY,
A. S. WORTHINGTON,
Of Counsel.

May 27, 1899.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the above and foregoing pages, numbered from 1 to 50, inclusive, to be a true and correct transcript of the record—as prescribed by rule 5 of the Court of Appeals of
33 the District of Columbia—in cause No. 41837, at law, wherein Hosea B. Moulton, to the use of William Oscar Roome, is plaintiff and The District of Columbia is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 13th day of June, A. D. 1899.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 909. The District of Columbia, appellant, *vs.* Hosea B. Moulton. Court of Appeals, District of Columbia. Filed June 16, 1899. Robert Willett, clerk.

34 WEDNESDAY, *October* 11*th*, *A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
HOSEA B. MOULTON. } No. 909.

The argument in the above-entitled cause was commenced by Mr. A. B. Duvall, attorney for the appellant.

THURSDAY, *October* 12*th*, *A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
HOSEA B. MOULTON. } No. 909.

The argument in the above-entitled cause was continued by Messrs. C. L. Frailey and A. S. Worthington, attorneys for the appellee, and was concluded by Mr. A. B. Duvall, attorney for the appellant.

35 THE DISTRICT OF COLUMBIA, Appellant,
vs.
HOSEA B. MOULTON. } No. 909.

Opinion.

Mr. Chief Justice ALVEY delivered the opinion of the court:

This action was brought to recover for personal injuries received by the plaintiff, the present appellee, by reason of alleged negligence of the defendant, the appellant, in allowing an improper obstruction in one of the streets of the city of Washington, causing the horse of the plaintiff to become frightened and unmanageable, resulting in the throwing the plaintiff out of his carriage down upon the street, producing the injury complained of. The case was tried upon the general issue plea of not guilty as alleged, resulting in a verdict and judgment for the plaintiff, and the defendant has appealed.

The facts are not numerous or conflicting except with respect to one or two particulars. There is some conflict in the testimony of the witnesses, though not of a very material character. This conflict of evidence relates principally to the defense of contributory negligence of the plaintiff to the injury suffered by him.

It appears from the evidence, as stated in the bill of exceptions, that on November 26, 1896, being Thanksgiving day, at about 3 o'clock in the afternoon, the plaintiff set out for a drive in a one-horse carriage with his family, consisting of his wife and child, who occupied the front seat of the vehicle with him, his wife's sister
36 and her child and his wife's mother, all three of whom occupied the rear seat in the carriage. As the party approached the vicinity of the intersection of Park and Pine streets northwest, driving along Park street, the plaintiff saw in front of him a large steam roller, which had been left on the south side of Park street a short distance west of Pine street, and standing as near the south

side curb as it could well be placed. It is shown by the evidence that about the time the plaintiff reached the middle of Pine street on Park, the horse suddenly took fright at the machine, or something about the machine, and almost immediately became unmanageable, and would not go past the machine. He reared and backed, and in suddenly turning around one of the wheels of the vehicle was crushed, the vehicle was overturned, and the plaintiff was thrown out on Park street, four or five feet east of Pine street, and his head was struck upon the street, and was seriously injured. According to the evidence the horse was quite gentle and had been driven by the plaintiff for some three years without accident, and had been driven past steam rollers when in operation without becoming frightened.

It appears that the roller had been used for repairing Park street for a week or so before the accident, but having broken down, it was not in use on the day of the accident. It broke down a day or two before the day of the accident, and it was thereupon left on the street, as before stated, though it was removed therefrom the same evening after the accident. Its position at the time of the accident was about fifty feet west of Pine street; and Park street at that point is forty feet wide from building line to building line, and, deducting the width of six feet of pavement for sidewalk on each side of the street, the width of the roadway where the roller stood was only about twenty-eight feet. The roller, it appears, was of the kind generally used in constructing macadamized roads. It had three wheels, the tread of the rear wheel being about eight feet. It was about eight feet long and about five or six feet high. The smokestack was only a little higher than the other part of the machine. At the time of the accident it had no fire in it.

There is some conflict of evidence, though not very material, as to the time that the roller had been allowed to stand on Park street after it had broken down, and before the accident occurred. This, however, was matter of fact that was allowed to be passed upon by the jury.

Upon the whole evidence, the court granted three special instructions on request of the plaintiff (which will appear at large in the case as reported), and of fourteen prayers offered for instruction by the defendant, the court, by consent of the plaintiff, granted the second, third, fourth, fifth and sixth of said prayers, and refused the others. And to the granting of the instructions prayed for by the plaintiff, and to certain portions of the general charge by the court to the jury, and to the rejection of the prayers offered by the defendant, the defendant excepted. And it is upon this exception that the case is presented to this court.

By the act of Congress of February 21, 1871 (the portion whereof that constitutes sec. 77, R. S. D. C.), it is provided that the board of public works, now the Commissioners of the District, "shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys," etc. And with respect to the Commissioners of the District, having such full and complete control of the streets, it has been held, and it is

now settled, that they are under a duty to keep the public ways of the city in such condition that they can be used with reasonable safety. "Their neglect in that matter is the neglect of the municipal corporation of which they are the responsible representatives, although subject to the paramount authority of Congress." District of Columbia *v.* Woodbury, 136 U. S., 450, 455, 456.

In defining the special circumstances under which a municipality like the District of Columbia may be held liable for personal injuries received by a passenger or traveler, or injury to personal property, as the consequence of a horse taking fright from an object allowed to remain within the limits of a street of a city, calculated to produce fright of a horse of ordinary gentleness and tractability, has been the subject of difficulty with the courts, and in regard to which the courts of the country are far from being in entire accord. Indeed, by some of the State courts of high authority, the principle of liability of municipalities for the consequences of fright to horses in the streets of the city has been denied. This would seem to be the case in the supreme judicial court of Massachusetts, and in some other of the State courts following the decisions of the supreme court of Massachusetts. But the great weight of authority is the other way, and in support of the principle of liability of the municipality. According to the principle of the great majority of cases, if an object calculated to produce fright of a horse of an ordinary gentle character be allowed to remain in a street an unreasonable length of time, such object will be regarded as a nuisance and an undue obstruction of the travel of the streets.

But where injury occurs from such cause, in order that liability attach thereupon, it must clearly appear that there is a concurrence of both injury and wrong, the latter being the cause of the former. If a party does an act that is not unlawful in itself he cannot be held responsible for any resulting injury unless the act be done at a time or in a manner or under circumstances which render the party chargeable with a want of proper regard for the rights and safety of others. In such case the negligence imputable to the party doing the act constitutes the wrong, and such party is accountable to persons injured, not because damage has resulted from the doing of the act, but because, the act having been done negligently or without due care, it has resulted in injury. If the act was not wrongful in itself, the wrong must necessarily be sought for in the time or manner or circumstances under which it was done, and injury does not prove the wrong, but only makes out the case for redress after the wrong is established. Macomber *v.* Nichols, 34 Mich., 212. In this case there can be no question of the lawfulness of the use of the roller in the repair of the street, and of its being allowed to
37 remain on the street such reasonable time after it became disabled as would be required to enable the defendant or its agents, by the exercise of reasonable diligence, to remove the machine out of the way. The alleged non-exercise of such reasonable diligence is the gravamen of this case.

Now, supposing the roller to have been an object naturally calculated to produce fright in a horse of an ordinary gentle character,

and that it was allowed to remain in the street for an unreasonable time after it became disabled and before the accident, and that it did produce fright of the horse and caused the accident without contributory negligence on the part of the plaintiff, it would seem to be clear the defendant became liable for the resulting injury to the plaintiff. For it is now settled, by a great preponderance of authority, that where a horse of ordinary gentleness and tractability becomes frightened at an object naturally calculated to frighten horses, which the municipal agent or superintendent has negligently placed, or permitted to be placed and allowed to remain in a street or highway of the city, and injury results, without contributory negligence, the municipality will, as a general rule, be liable for such injury. And this liability extends, according to the great weight of authority, to objects on the margin of the street or highway and within its limits, although such object may not be within the traveled way of such street, and the horse or vehicle may not come in actual contact with the object of fright. The object, however, must be of such a nature as to be *naturally calculated* to frighten horses of *ordinary gentleness*, and it is incumbent upon the plaintiff to make it clearly appear that the object in the street was calculated to produce fright in a horse of ordinary gentleness, and that the horse frightened was in fact one of ordinary gentleness and easily subject to control; for it is not against capricious and fractious horses that the municipality is required to guard. The *onus* of these facts is upon the plaintiff, and in a doubtful case a recovery ought not to pass against the municipality. It is only where there is a plain and obvious neglect of duty on the part of the municipal agents that liability can arise in such cases as the present. Ring *v.* Cohoes, 77 N. Y., 83; Hay *v.* Philadelphia, 81 Penna. St., 44; Young *v.* City of New Haven, 39 Conn., 425; Ward *v.* North Haven, 43 Conn., 148; City of Chicago *v.* Hoy, 75 Ill., 530; Morse *v.* Richmond, 41 Vt., 435; Bartlett *v.* Hooksett, 45 N. H., 18; Rushville *v.* Adams, 107 Ind., 475; Fosbay *v.* Glen Haven, 25 Wis., 228; Hughes *v.* Fond du Lac, 73 Wis., 386; Bennett *v.* Fifield, 13 R. I., 139; Ayer *v.* City of Norwich, 39 Conn., 376; Card *v.* City of Ellsworth, 65 Me., 547. And among the cases that we have just cited, may be found cases where the objects in the streets which produced fright of the horses, were steam rollers, dead horses, boulders, and other objects naturally calculated to startle and produce fright of a horse, and which were found, under the circumstances of those cases, to be an undue obstruction of the street.

The cases upon the subject have been clearly summarized by the text writers of authority, and by none more clearly than by Judge Dillon in his work on Municipal Corporations. In vol. 2, sec. 1011, the author says: "An object in a public street calculated to frighten horses, such as a dead animal, is such an obstruction as may make the corporation liable in case of an accident resulting in injury, happening in consequence thereof, if it is allowed to remain in the street for an unreasonable time. Thus, where a horse died in a public street of a city about 2 o'clock p. m., and the fact that the dead body was left in the street was known to a policeman of the

city that night, and on the next day about 3 o'clock p. m., the plaintiff, while driving along the street, without negligence on his part, was injured in consequence of his horse taking fright at the dead animal, the city, under the circumstances, was held liable to him for the injury. Where there is a defect or object in a street which is calculated to frighten horses and an injury occurs by reason thereof without the fault of the driver, the corporation is liable; but objects outside the traveled way, and not near enough to the line of public travel to interfere with or incommode travelers, are not defects in the highway. It is not requisite, as we have already seen, that a highway, in its whole width as located, should be fitted for travel. It is sufficient if it be of suitable width and in good condition for the needs of the public." And for this text the author has cited a large number of decisions.

In view of the principles that would seem to be so amply supported by authority, we think the court below committed no error in granting the three special instructions on the request of the plaintiff. The first of these instructions is clearly within the principle of the authorities we have cited; and the second, relating to the principle of contributory negligence applicable in such case, would seem to be altogether free from objection. It is fully within the principle of the authorities upon the subject, and particularly the cases of Railroad Company *v.* McDonald, 152 U. S., 262, 281, and Railroad Company *v.* Hickey, 5 App. D. C., 436, 471.

All that could have been required of the plaintiff in the sudden emergency that arose and under which he was required to act, was that he should have acted as an ordinarily prudent and careful man would have acted under like circumstances; and this was the standard of case that the jury were required to find that directed the conduct of the plaintiff at the occurrence of the accident.

With respect to the third special instruction given at the instance of the plaintiff, that relating to the measure of damages, we do not understand that instruction to be the subject of the assigument of any supposed error. It would seem to be free from any substantial ground of objection.

We come now to consider the prayers for instructions offered by the defendant. And with respect to the first, the eleventh, twelfth, thirteenth and fourteenth of those prayers, they were each and all properly refused, as they denied the right of the plaintiff to recover, under the pleadings and evidence. As to the second, third, fourth, fifth and sixth of the defendant's prayers, they were severally granted by the court with the consent of the plaintiff. They are therefore only important to be noticed as showing the
38 grounds, and the extent of the matters of defense, that were submitted to the jury.

By the second of the defendant's prayers thus granted, the jury were instructed that if they believed that the plaintiff by his own negligence directly contributed in any degree to the injury complained of, they should find for the defendant. By the third of these prayers, the jury were instructed that the defendant is not an insurer against accidents upon its streets and it can only be held

liable upon proof of negligence as alleged in the declaration. By the fourth of said prayers, the jury were directed that the burden of proof was upon the plaintiff to show by a preponderance of the evidence that the accident whereby he was injured was the result of negligence on the part of the defendant as alleged in the declaration; and if the jury should find that such evidence was consistent equally with the existence or non-existence of such negligence on the part of the defendant, the plaintiff could not recover, and the verdict should be for the defendant. By the fifth prayer, the jury were directed that if they should believe from the evidence that the plaintiff, by the exercise of such care, prudence and caution as a reasonably prudent person would have exercised under similar circumstances, might have avoided the injury suffered by him, then he could not recover, and the verdict should be for the defendant. And lastly, that the jury were not at liberty to presume negligence on the part of the defendant from the mere happening of the accident.

These propositions were all given to the jury as instructions from the court; and when taken in connection with the instructions given at the instance of the plaintiff, the case would appear to have been very fully placed before the jury in all its aspects; and that too as favorably to the defendant as the facts of the case would warrant.

The seventh, eighth, ninth and tenth prayers of the defendant presented propositions not within the principles hereinbefore stated, and they were therefore properly refused. By the seventh prayer, the court was asked to hold and declare that the time which the roller was allowed to remain on Park street, in its disabled condition (according to the assumption of the prayer) before the happening of the accident, was not an unreasonable time for it to remain there; and the allowing it so to remain did not constitute negligence on the part of the defendant. The time and the circumstances under which the roller was allowed to remain upon Park street after it was broken were sought by this prayer to be made a question of law, to be decided by the court; and thus to withdraw the question of negligence from the jury, as matter of fact. In rejecting this prayer, we think the court committed no error.

By the eighth prayer, the defendant asked that the jury be instructed that the fact of the plaintiff seeing the roller, and thus becoming informed of its position, before the accident actually occurred, and in time to have avoided the accident, dispensed with the necessity of any other notice of the position of such roller; and by the ninth prayer, the request was that the jury be instructed that if the roller was, at the time of the accident, on Park street for the purpose of being used in the work of repairing that street, then the roller was in no sense a defect or obstruction; and if the plaintiff saw it in time to have avoided it by going down another street, but, instead thereof, attempted to pass the roller, and in so doing his horse became unmanageable and overturned the carriage and threw the plaintiff out, then he was guilty of negligence, and was not entitled to recover, and the verdict should be for the defendant.

These prayers assumed that the plaintiff knew, or ought to have known, or had good cause to believe, that his horse would become unmanageable and would refuse to be driven past the roller. This knowledge, however, he could not be charged with in anticipation of the conduct of the horse and the happening of the accident; and especially not as he had reason to rely upon the gentleness and manageable character of his horse. It was the sudden fright of the horse that produced the accident, and which could not have been anticipated from his previous knowledge of the horse. These prayers were properly refused.

The tenth prayer presents a proposition in regard to which there has been some diversity of opinion, and especially in the later cases in the Massachusetts supreme court, and some other courts. By this tenth prayer the court was asked to instruct the jury, that if the plaintiff's horse or carriage *did not come in contact* with the steam roller on Park street, but that the horse was frightened by it, became unmanageable and overturned the carriage at a point in Park street, some distance from the roller, where the street was safe, then the plaintiff is not entitled to recover, and the verdict must be for the defendant.

The great weight of authority is so decided against this proposition, that we can have no hesitation in saying that the court below was right in refusing the prayer as an instruction. We have already referred to many of the cases upon this subject, and which hold that the municipality is liable for an injury occasioned by the fright of a horse at an object within the limits of a street or way, although neither the horse nor the carriage came into contact with the object producing the fright. Bartlett *v.* Hooksett, 48 N. H., 18; Morse *v.* Richmond, 41 Vt., 435; Ayer *v.* Norwich, 39 Conn., 376; Card *v.* City of Ellsworth, 65 Me., 547; Foshay *v.* Glen Haven, 25 Wis., 288; Town of Rushville *v.* Adams, 107 Ind., 475.

This tenth prayer, therefore, was properly rejected.

We have carefully examined the general charge to the jury by the court below, and we find nothing therein inconsistent with the principles embodied in the special instructions granted at the instance of the respective parties; and nothing in any part of the charge to which valid exception could be taken.

It follows that the judgment appealed from must be affirmed; *and it is so ordered.*

Judgment affirmed.

39 WEDNESDAY, *November 8th, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant, *vs.* HOSEA B. MOULTON. } No. 909. October Term, 1899.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof it is now here ordered and ad-

judged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed.

Per MR. CHIEF JUSTICE ALVEY.

November 8, 1899.

40 TUESDAY, *February 6th, A. D.* 1900.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
HOSEA B. MOULTON. } No. 909.

On motion of Mr. A. B. Duvall, of counsel for the appellant in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed.

41 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between The District of Columbia, appellant, and Hosea B. Moulton, appellee, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of February, in the year of our Lord one thousand nine hundred.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

42 UNITED STATES OF AMERICA, *ss:*

To Hos[illegible]B. Moulton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The District of Columbia, is plaintiff in error and

you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this sixth day of February, in the year of our Lord one thousand nine hundred.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 6th day of February, 1900.

A. S. WORTHINGTON,
CHARLES L. FRAILEY,
Attorneys for Defendant in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Feb. 6, 1900. Robert Willett, clerk.

43 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 42, inclusive, contain a full, true, and correct copy of the transcript of record and proceedings of said Court of Appeals in the case of The District of Columbia, appellant, *vs.* Hosea B. Moulton, No. 909, October term, 1899, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 17th day of February, A. D. 1900.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No., 17,672. District of Columbia Court of Appeals. Term No., 224. The District of Columbia, plaintiff in error, *vs.* Hosea B. Moulton. Filed March 15, 1900.

In the

Supreme Court of the United States

October Term, 1906.

No. 464.

DISTRICT OF COLUMBIA, Plaintiff in Error,

vs.

HOSEA B. MOULTON, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ANDREW B. DUVALL,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 224.

DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

HOSEA B. MOULTON, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

The plaintiff below sued the District of Columbia in an action on the case, claiming damages for personal injuries sustained by him November 26, 1896, on Park street, alleging in his declaration that it was the duty of the District to keep said street free from obstructions likely to scare or frighten reasonably gentle horses passing and repassing on said street; that while he was carefully driving such a horse attached to a carriage his horse became frightened and was made unmanageable and ungovernable by a certain steam roller, negligently and improperly suffered and permitted by the District to remain in Park street for the space of two days, so as to be a public nuisance and dangerous to travelers on said street with their carriages and horses; that his carriage, without fault of his own, was upset and he was thrown violently out upon the ground and seriously and permanently injured and prevented to a great extent from transacting his lawful affairs and practicing his profession as a lawyer.

Upon the trial of the case there was a verdict for the plaintiff of $6,450; the defendant's motion for a new trial was overruled and judgment entered on the verdict (Record 7); the case was carried on bills of exception (9) to the Court of Appeals, District of Columbia, where the judgment was affirmed (15 App. D. C. 363), hence the present writ of error.

STATEMENT OF THE CASE.

Park street is not one of the streets of the city of Washington. It lies some distance north of the city limits, in what was formerly known as the County.

Park street runs east and west and it is forty feet wide from building line to building line; its roadway is twenty-eight feet. Pine street runs north and south and is fifty feet wide; it was not macadamized or graveled, but it was traveled by teams (9); this street is nine hundred and thirty-six feet west of Fourteenth street.

The steam roller (14) was the kind usually used in constructing macadamized gravel roads. It had three wheels, the tread of the rear wheel being about eight feet, which was its extreme width; it was about eight feet long and about five or six feet high. The smokestack was a little higher than the other part of the machine. It was at rest, without fire or steam in it.

Location of the Roller at the Time of the Accident.

Cole (9), "The roller was on the south side of the roadway of Park street, about as close as it could be driven to the sidewalk." Emmerich (13), "It stood about fifty feet west of Pine street." Jennings (15):

> "It was standing on Park street, about sixty feet west of the place of the accident, and about twenty or thirty feet west of Pine street. Repairs had been going on in the roadway of Park street for about a

week or so, and the roller had not been there all the time, but had been brought there off and on."

Some of the plaintiff's witnesses testified that the roller was covered with white canvas—Cole (9), Moulton (10), Mrs. Turnburke (11)—that there was no covered canvas on the roller is established by the testimony of Jennings (15) and Policeman Jett (16).

Length of Time the Roller Had Been Standing in the Street.

There was a conflict of testimony as to the length of time the roller had been standing in Park street. The plaintiff's witnesses fixed the time as follows: Cole (9), "It had been on that street for several days prior to that time. They were resurfacing the street with macadam." He had seen the roller in that position there from at least one to three days. He had driven by it two mornings. Whenever he saw the roller it was at rest and in about the same position as at the time of the accident. Sarah Woodland, a servant employed by Mrs. Miller at her house on the southeast corner of Pine and Park streets (13):

> "They had been using this roller there all the week; they would bring it there and use it a while and take it away and bring it back; they brought it back on Wednesday morning, when it broke down; could not tell what time it was it broke down; they took it away Thanksgiving evening."

Emmerich (13) observed the roller in Park street on Thanksgiving Day and part of the day previous. Witnesses for the defendant, Thomas, engineer of the roller and in charge of it (14), testified that the roller had only been on Park street since 10 o'clock on the morning of the accident; that the machine had been there on the previous day, but had been taken and used on Yale street and Harvard street, where it had remained over night and had

been brought back to Park street on Thanksgiving Day and had only been there an hour when it broke down. Witness placed it as near the curb as possible and left it in that condition. Calhoun (15), foreman for the District in the Street Service Department, testified that the roller was under his charge on the day of the accident and broke down on that day; when it broke down he left it in charge of Goheens, the watchman, with instructions to warn people in order to prevent danger to those who drove by there; on the day of the accident he had orders to send the roller up to Park street. Collins (15), in charge of repairs on Park street, testified he thought the roller had been brought to Park street only on the morning of the accident. Jett, policeman (16), testified there was a man in charge of the roller; that the roller never remained in Park street over night to his knowledge. Goheens, a watchman, watching the steam roller (16): "It had just been brought there that day about 4 o'clock and broke down about 4.10 o'clock, about an hour prior to the accident; it was about a foot and a half from the curb on the south side."

The Roller Was in Full Sight of the Plaintiff, and He Unnecessarily and Recklessly Insisted on Driving Past it.

Plaintiff testified (10) that about 3 o'clock he drove out Fourteenth street to Park street and turned into that street going west; that he saw in front of him a steam roller of unusually large size; there was something thrown over a portion of it; that he had handled the horse he was driving for years and in his judgment it was as safe and as good a carriage horse as could be had; that he had driven by steam rollers when they were in motion with this horse time and time again when they had steam up; that as he approached this machine his horse pricked up his ears as a horse naturally would, but plaintiff did not discover *that his horse was*

unmanageable until he approached the lines of the intersecting streets; that when he reached the east line of Pine street for some reason the horse there seemed in a moment or two to become *intensely frightened,* either because of the flapping of the canvas on the roller or from some other cause; that he was guiding his horse between the roller and the curb to the right going west, and when he got up, just perhaps in about the middle of Pine street, his horse *became unmanageable* and reared on his hind feet; that he then saw his horse was badly frightened and that he could not go by the machine; that there was then but one thing to do, but the horse did not give him any chance to go back or turn and go down Pine street; he was rearing and backing; he rushed back and seemed to swing around; that the machine was about fifty feet west of Pine street on Park street; that on the north side of Pine street between the machine and the sidewalk there was sufficient space to drive by ordinarily, about ten or twelve feet (10) his wife said to him, "I think you had better turn back." Mrs. Turnburke, the plaintiff's sister in law (11) was on the back seat of the carriage at the time of the accident. They drove out Fourteenth street and turned into Park street and went along pleasantly; that in driving down Park street witness saw a steam roller about in the middle of the street; as they approached the roller the horse became very much frightened and seemed unmanageable, and just at that moment it seemed that Mr. Moulton would lose control of it. He tried to control the horse that seemed so terribly frightened; the wind blowing the canvass on the steam roller frightened the horse; the horse seemed to become unmanageable; but as he drove on he tried to control it; he spoke gently to it; he tried to turn and the horse reared and plunged, and in turning they went over. They had reached Pine street when the horse first showed symptoms of fright; the horse was terribly frightened in the beginning; plaintiff did not strike the horse with a whip, but tried to urge him by; that up to

the time the horse plunged and turned around plaintiff did not make any effort to turn down Pine street or to go back. J. J. Van Vleit (12) was riding a bicycle on Park street in the rear of the plaintiff's carriage; that plaintiff was in such a position with reference to the roller as to have seen it; plaintiff could not have gone over 10 or 15 feet toward the roller after the horse first showed fright; plaintiff did not use any more than ordinary force to go after he found his horse was frightened; that he attempted to turn to the left, but the horse at that time was in an unmanageable state and reared and plunged right back, and as he did so the accident occurred. Mrs. Van Vleit (12) was riding her bicycle on Park street in the rear of plaintiff's carriage; plaintiff's horse was proceeding quietly until he got within a short distance of the roller, about 50 feet, when the horse seemed as though he was frightened and did not care to go by, and with that reared on his hind legs and seemed to have a tendency to go backward; with that there was a crash and the wheel was dished under the buggy. Mrs. Saunders, the plaintiff's mother in law (14), was in the carriage at the time of the accident; the horse became very unmanageable, backing and plunging, and the next she knew they were turned over; the carriage only went a short distance after the horse showed signs of fright, and Mr. Moulton tried then to soothe and keep him quiet; plaintiff did not try to go by. The defendant's witnesses (15), Jennings was on Park street coming up from Fourteenth street, and was about one hundred and fifty or two hundred feet behind the plaintiff's carriage at the time of accident; plaintiff's carriage passed him about two hundred and fifty feet before it came to the place of accident; the steam roller was standing on Park street about sixty feet west of the place of the accident and about twenty or thirty feet west of Pine street. Improvements or repairs of the roadway of Park street had been going on for a week or so; the roller had been there off and on, not there all the time;

as far as he knew it had never remained there over night; he first saw the plaintiff's horse shy about forty or fifty feet east of Pine street and then go about the length of the courtroom; it looked as if the plaintiff was coaxing his horse on, but he could not say that plaintiff did any urging or whipped the horse. He saw the plaintiff turn his horse as if to go into Pine street, not to go into Pine street, but that way. At that time the horse was backing, and in backing the vehicle turned over; the roller could have been seen in the street as far east as Fourteenth street and a distance of from six to eight hundred feet; the plaintiff's horse went a little distance toward the roller when he first shied; there was no cover on the roller, as far as he knew. John Robinson (16) was a District laborer, and on Thanksgiving Day, the day of the accident, he came down Princeton street to go to Park street, and when he got there he met a gentleman driving up with a black horse with three ladies in the carriage; it was near about 5 o'clock; he saw the watchman there in charge of the roller; plaintiff came up with his horse and carriage and the horse got more frightened the closer he got to the steam roller; plaintiff bore the reins down on the horse and kept driving toward the machine; the horse stopped three times; after the horse came to such a distance he looked around and saw the machine again, and then the watchman went and seized the horse; witness heard him say nothing and the gentleman shook his head and told him to let him go, and the horse turned and sawed and reared and turned the carriage over; the horse was not badly frightened until he suddenly turned around; witness ran to the carriage and lifted it up; plaintiff's horse was about one hundred yards east of Pine street when he shied, but the gentleman pulled him in and wanted him to go by the roller, but the horse did not want to go that way, and in turning it broke the wheel down; Frank Goheens (16) was watching the steam roller on

Park street; it had broken down in the afternoon about an hour prior to the accident; it broke down about fifty feet from Pine street; witness got to Park street with the roller at 3 o'clock, when it broke down; they drove it up as close as they could to the curb and left it about a foot and a half from the curb of the south side. At the time of the accident to the plaintiff he was standing right by the engine and noticed the plaintiff's carriage coming from the other side of Pine street and offered to assist him by the roller, walking up to the other side of the street and offering to put his hands on the reins of the horse, but the plaintiff said, "No, I will drive this horse; I guess I am capable of driving it." Witness said, "All right," and walked back and stood with his back up against the boiler of the engine. The horse then turned right around and threw the plaintiff out. When witness first noticed the plaintiff's carriage it was on the east side of Pine street, about sixty feet, and the plaintiff had plenty of room to go around after witness offered his assistance, which was declined. Plaintiff did not do anything except to take the reins in both hands and hit the horse and say, "I will drive this horse by there," and just as he did that the horse took a short turn and threw them out; when witness went to the assistance of the plaintiff the horse was just pricking its ears and looking at the roller; there was no steam or fire in the roller. Plaintiff and his witnesses testified that no watchman took hold of plaintiff's horse or gave him warning in reference to the roller.

ASSIGNMENT OF ERRORS.

The Court of Appeals erred in sustaining and affirming the action of the trial court—

1. In granting the plaintiff's first prayer (17), and in refusing to grant the defendant's first prayer (20), ninth prayer

(19), tenth prayer (19), eleventh prayer, twelfth, thirteenth and fourteenth prayers (20), because the presence of the steam roller in Pine street was not an actionable obstruction thereof; and no action will lie against the District of Columbia for injuries resulting from the frightening of a horse by a steam roller at rest in its streets, and because the plaintiff was guilty of contributory negligence.

2. In granting the plaintiff's second prayer (17), because the same was misleading and does not correctly state the doctrine of contributory negligence.

3. In rejecting defendant's seventh prayer (19), because the question of reasonable time under the circumstances was a question of law.

4. In rejecting defendant's eighth prayer (19), because the object of a warning, sign or barrier is to give notice, and actual knowledge accomplishes that object and supersedes the necessity for such notice; and in instructing the jury (parts of charge in brackets) that it was (25) for them to consider whether the plaintiff was not authorized to believe that the defendant would have sufficient protection in the neighborhood of the roller to avert all dangers, and that if the roller was left in the street without having someone to give warning of it by night and by day that they would be justified in finding that that was actionable negligence.

I.

The Presence of the Steam Roller in Park Street was Not an Actionable Obstruction Thereof.

Park street was not out of repair; it was being improved; but it was entirely safe for travel. The steam roller standing close to the curb on the south side of the street was not an obstruction in Park street. There was ample space to drive on Park street. The plaintiff knew this. He says:

"There was sufficient space to drive by ordinarily, about ten or twelve feet."

A city has the right to use any proper implement, even run by steam, for the purpose of constructing or repairing its streets, and, in the absence of carelessness or negligence in its management, it is not liable for damages occasioned by a horse becoming frightened thereat.

Sparr *vs.* St. Louis, 4 Mo. App. 572.
Macomber *vs.* Nichols, 34 Mich. 212 (Cooley, J.).

The steam roller was not *per se* an object calculated to frighten horses of ordinary gentleness. Judicial notice will be taken of whether an object is of that character. The question is not a question for the jury; for example, a box freight car standing still at a highway crossing has been held, as matter of law, not of itself a frightful object to horses of ordinary gentleness.

Gilbert *vs.* Flint, etc., Railway Co., 51 Mich. 488.

It has been held that a large vehicle used as a daguerrean saloon standing partly within the limits of a highway, but outside of and several feet from the traveled path, is not a defect in the highway, which will entitle a traveler to recover against a town damages for the injuries sustained by him if his horse, while driven by himself, is frightened thereby, and becomes unmanageable and runs for some distance and upon an embankment, so that the carriage is broken and himself thrown upon the ground and injured.

Keith *v.* Easton, 2 Allen, 552.

The body of a common riding wagon turned up on edge at the side of the road can not be regarded as so likely to frighten horses as to render the town liable for damages done by a horse frightened at it in case it is permitted to remain there. Horses are accustomed to pass such buggies

many times daily when traveling the highways, and to see them at home.

> "Be sure, the horse was alarmed by its appearance. But the same horse might as well be terrified by suddenly seeing some rocks or bushes by the roadside, or be alarmed at a woodpile, a manure heap, a hay rack, a cart, a wheelbarrow, a guideboard, a telegraph pole or something else of the numberless inanimate things necessarily seen near or upon our streets and highways. All the eccentricities of sensitive horses can not be guarded against by towns. The slightest objects will sometimes frighten them. A bright chip, a bit of paper in motion, or an umbrella, or even a shadow, will terrify some horses. But many such incumbrances there are upon our roads that can not be considered defects. There must be a sensible and practical limitation of the municipal responsibility. Towns are not to be regarded as insurers. The truth is, that in many of this class of cases, more fault should be charged upon the horse and his driver, and less upon the town. It is an easy thing for witnesses to bolster up the character of horses for gentleness, and to swear to careful driving, where it is a point to be proved by opinion. But, at all events, we are not satisfied that it should reasonably be expected by the town, that the wagon body, situated as it was, would naturally have the effect to frighten 'an ordinarily kind, gentle and safe animal, well broken for traveling upon our public roads.'"
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> Nichols *vs.* Athens, 66 Me. 402.
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> Kumbo *vs.* Gilham, 103 Wis. 312.

The liability, if any, arises out of the fact that obstructions are permitted to be there for an *unlawful* purpose.

Cairncross *vs.* Pewaukee, 78 Wis. 66.

A stream of water thrown into a street by a fireman is not a defect within the meaning of the highway law.

Edgerly *vs.* Concord, 59 N. H. 78.

In Piollet *vs.* Simmers, 106 Penna. St. 95, it was said that the liability would attach if the objects were "calculated to frighten ordinary gentle and well trained horses."

> "For, if persons are bound to guard against frightening skittish, vicious, timid and easily frightened horses, it will not be possible to state any limit of precaution which will be a protection against liability." And the court quoted from Pittsburg, etc., Rwy. Co. *vs.* Taylor, 104 Penna. St. 306:
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> "The frightening of a horse is a thing which can not be anticipated, and is governed by no known rules. A leaf, a piece of paper, a lady's shawl fluttering in the wind, a stone or a stump by the wayside, will sometimes alarm even a quiet horse."

THE PLAINTIFF'S CARRIAGE DID NOT COME IN CONTACT WITH THE STEAM ROLLER; HIS HORSE WAS FRIGHTENED BY ITS PRESENCE. THE STREET WAS NOT OUT OF REPAIR WHERE HE WAS INJURED.

If the horse of a traveler becomes frightened at an object in the highway which is an obstruction and defect therein, and with which, but for his fright, he would have come in contact, and by reason of such fright, without coming in contact with it, runs away and overturns the carriage at a place where there is no defect, the city or town is not liable for injury so sustained by the traveler.

Cook *vs.* Charlestown, 98 Mass. 80.

An object in a highway with which a traveler does not come in contact or collision, and which is not an incumbrance or obstruction in the way of travel, is not to be deemed a defect for the reason that its bright appearance causes a horse to take fright, in consequence of which he momentarily escapes from the control of his driver and causes damage.

Cook *vs.* Montague, 115 Mass. 571.

A statute making a municipality liable for an injury that is due to a street's being out of repair applies only where the want of repair is the immediate cause of the injury, and it is not putting a highway out of repair to let things stand in it for a time that form no part of it. So *held* where a horse was frightened at the sight of a boulder that had been dug out of the roadbed and left between the gutter and the traveled part of the way until it could be removed by a person who had asked for and obtained it for building purposes.

Agnew *vs.* City of Corunna, 55 Mich. 428.

A telephone company, in laying wires underground under a city ordnance granting permission to occupy the portions of the streets of the city necessary for that purpose, obstructed a part of the street, leaving open for travel a space of about seven and a half feet between a manhole and the curbing. The cap of the manhole was partly removed so as to extend into this open space. An experienced driver, with full knowledge of the surroundings, used this route, when he might have used another, and in so doing his horse became frightened and shied, throwing him from the wagon to the street, causing his death. *Held* that decedent assumed the risk and that there can be no recovery for his death.

Cain's Admr. *vs.* Ohio Val. Tel. Co., 47 S. W. Rep. (Ky.) 754.

A county is not liable for an injury sustained by one, before entering upon a bridge, by a team becoming frightened at its defective condition, although it has been out of repair so long as to charge the county with notice.

Board of Comms., etc., *vs.* Rickel, 106 Ind. 501.

When a horse, while being driven with due care upon a highway which a town is bound to keep in repair, becomes, by reason of fright, disease or viciousness, actually uncontrollable, so that his driver can not stop him or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway by which an injury is occasioned, the town is not liable for the injury unless it appears that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable in this sense if he merely shies or starts or is momentarily not controlled by his driver. City authorities are bound to keep in repair only such streets and parts of streets as are necessary for the convenience and use of the traveling public, and where at the point of the accident the street was abundantly wide and well repaired to enable persons, with the exercise of ordinary care to avoid the injury, the city will not be responsible merely from the existence of a defect in the untraveled portion of the street.

Titus *vs.* Northbridge, 97 Mass. 258.
Approved in Brown *vs.* Mayor, 57 Mo. 156.
Kingsbury *vs.* Dedham, 13 Allen, 186.
Perkins *vs.* Fayette, 68 Me. 152.

Vide also the dissenting opinion of Carpenter, Justice, in Young *vs.* New Haven, 39 Conn. at 442.

And also the dissenting opinion of Adams, Chief Justice, in Stanley *vs.* Davenport, 54 Iowa, 463.

There is an apparent conflict of authority upon the subject of liability in such a case as the present, but we insist that twentieth century civilization has passed beyond the era of the horse, and in the interest of progress his erstwhile rights upon the highway must be substantially abridged or modified. Steam and electricity have supplanted him in

the field of serviceable use, and in consequence he has become a back chapter.

The municipality should not be held liable in this case for an injury occasioned by plaintiff's horse taking fright at a *steam roller, a highly useful machine, which was being* used by the District from day to day, in the construction and repair of Park street, at and near the place where the accident happened, and which had been disabled only the day before.

Considerations of public policy, and the spirit of progress and improvement characterizing the present age, should encourage and not deter the use, constant or intermittent, of a machine which is such a great advance over old methods and appliances.

Steam fire engines are highly calculated to frighten horses, yet their use upon the highway must be considered permissible and proper; and if, while one of these engines is in operation, or on its way to a fire, a horse should become frightened at it, and injury result, an action for damages would not lie.

Numberless appliances of modern civilization, calculatad to frighten horses, are found upon the streets and highways, but their use is not necessarily to be forbidden for that reason. Private convenience must often yield to paramount public covenience.

The law should and does keep step with progress; the allowable things of today are in many instances the things which were reprobated yesterday. How long is the horse to maintain his empire after he has lost his relative place of usefulness and necessity?

In this jurisdiction it is settled law, that the municipality has the right to use its streets for the purpose of municipal constructions, and to employ the best adapted means and appliances for the execution of the work of the improve-

ment, and while such improvements are in course of construction, persons using the streets must take notice of the work and in their use of the street must exercise their ordinary powers of observation, and not recklessly or unnecessarily incur risk, and where the nature or condition of the work and the implements employed therein obviously require care on the part of those using the streets, *special care and caution* may reasonably be insisted upon in order to avoid the risk of accident, and if a party *recklessly* or *needlessly* incurs risk of danger and suffers thereby he can have no remedy as against the municipality. The only restriction upon the exercise of the municipality through and over the streets in making public improvements therein is that the work shall be done in a proper and reasonably careful manner to avoid injury, and that the means and instruments employed in doing the work shall be reasonably adapted to the accomplishment of the undertaking and not be of an unnecessarily dangerous character.

Dist. of Col. *vs.* Ashton, 14 App. D. C. 571.

One can not assume a position of danger and then complain of injury from negligence which could cause no injury except to one in that dangerous position.

RR. Co. *vs.* Jones, 95 U. S. 439.
RR. Co. *vs.* Houston, 95 U. S. 697.
Schofield *vs.* RR. Co., 114 U. S. 615.

Plaintiff is guilty of contributory negligence which disentitles him from recovery where he has knowledge of the dangerous condition of a street and pursues his course thereon in preference to taking another street, which he could have done with safety, although with inconvenience.

Dist. of Col. *vs.* Brewer, 7 App. D. C. 113.

The plaintiff can no more recover in this case than one

who, knowing the defective condition of a sidewalk, ventures upon it without taking the precaution necessary to prevent a fall.

Aurora *vs.* Brown, 11 Ill. App. 422.
Mayhew *vs.* Burns (Ind.), 2 N. E. R. 793.
Erie *vs.* Magill, 101 Pa. St. 616.
Schaefler *vs.* Sandusky, 33 Ohio St. 246.
Wilson *vs.* Charlestown, 8 Allen, 137.
Parkhill *vs.* Brighton, 61 Iowa, 103.
Cook *vs.* Johnson, 58 Mich. 437.
Black *vs.* Manistee, 107 Mich. 60.
Grandorf *vs.* District, etc., 113 Mich. 496.

The Plaintiff Was Guilty of Contributory Negligence.

The defendant was put by the trial court at great disadvantage before the jury in respect to the doctrine of contributory negligence. We were practically deprived of the benefit of the doctrine in its application to the case at bar. It is true the court granted our instructions on the subject, but it took occasion in the same breath (26) to discredit the doctrine as a principle of law. The court should have directed a verdict for the defendant because of the plaintiff's contributory negligence. It is plain from his own testimony and that of his witnesses that he was reckless in undertaking unnecessarily to drive by the roller.

His sister in law, Mrs. Turnburke, who was in the carriage with him, testified (11) that—

> "as they approached the roller the horse became *very much frightened* and seemed unmanageable, and just at that moment it seemed that Mr. Moulton would lose control of it. He tried to control the horse that seemed so *terribly frightened*; the wind blowing the canvass on the steam roller frightened the horse; the horse seemed to become unmanageable, but as he drove on he tried to control it; he spoke gently to it; he tried to turn and the horse reared and pluuged, and in turning they went over. *They had*

not reached Pine street when the horse first showed symptoms of fright; the horse was *terribly frightened in the beginning.*"

By this witness, therefore, the plaintiff showed that his horse did not become frightened and unmanageable at the moment, but some considerable time prior thereto, and at a place quite distant from, the place of accident; and at a time when and at a place where he could have dismounted and controlled his horse, or turned back in the way he had come, or turned to the left and gone safely down Pine street. It is to be remembered that Pine street was fifty feet wide; and this witness states that the horse was *terribly frightened in the beginning*, and became *very much frightened and seemed to become unmanageable*, but yet plaintiff persisted in his efforts to drive on.

The testimony of the plaintiff himself is to the same effect. He did not discover that his horse was unmanageable (10) "until he *approached* the lines of the intersecting street" (meaning Park street, on which he was driving, and Pine street, running at right angles to it)—so that his horse, which had become frightened before that, had actually become unmanageable when he was more than one hundred feet from the roller, and not, as he afterwards stated, "when he got up, just perhaps in about the middle of Pine street;" he stated also that his horse seemed to become *intensely frightened* when he reached the east line of Pine street. There is but one view that can be reasonably taken of all this; it is that the plaintiff knew in time to have avoided this accident that his horse would not pass the roller; that he could have escaped injury, but that he chose to take the risk, relying upon his supposed skill as a driver and mastery over his horse, which "he had driven by steam rollers when they were in motion time and time again when they had steamed up." The defendant's witness Robinson (16) stated that plaintiff's horse shied when about one hundred

yards from Pine street; and this witness and Goheens (16) testify that the plaintiff insisted on driving past the roller.

The language of the Court of Appeals of the District of Columbia in another case seems quite appropriate here; in that case the court denied the liability of the municipality. It said:

> "Upon reading the evidence, the first question that naturally suggests itself is, why should the buggy have been driven into a place of danger, with full knowledge of the risk, and that it required very neat driving to go through the space between the excavations, according to the evidence of the driver of the buggy? It is true, everyone has a right to travel the street; but it is an established principle, that a party who ventures to pass a dangerous defect or obstruction in a street or highway, knowing its condition, is bound to exercise a degree of care proportionate to the danger. . . . The shying of the horse seems to have been the immediate cause of the accident; but what caused the horse to shy is matter of pure conjecture. The buggy was overturned by being run upon one of the piles of earth, and that was caused by the shying of the horse from the regular course or way. It was the upsetting of the buggy, and throwing out the plaintiff that produced the injury complained of. To entitle the plaintiff to recover for this injury, it must be shown that the alleged negligent defect in the street, if defect were shown to exist, was the sole cause of the injury. Where the injury follows from a defect united with some distinct, efficient cause, without which it would not have happened, the plaintiff can not recover."
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> Swart *vs.* D. C., 29 Wash. Law Rep. 138.

II.

The Doctrine of Contributory Negligence was Not Correctly Declared.

The court erred in granting the plaintiff's second prayer (17), because the same was misleading and does not correctly state the doctrine of contributory negligence.

Said prayer is fatally erroneous in that it assumes a state of facts which was not proven; there was no proof that the plaintiff's horse "became unmanageable the moment or almost immediately before the accident occurred"; as we have already shown, the testimony of the plaintiff himself and of his sister in law (Mrs. Turnburke) establishes the fact that the horse was "terribly frightened in the beginning," "very much frightened," and "seemed unmanageable" quite a considerable time prior to the accident and before he had reached Pine street, and when and where plaintiff could have avoided the accident if he had not been intent on dominating his horse and forcing him to drive past the roller.

Under the circumstances of this case, the court should have instructed the jury that the plaintiff was required to exercise special care and caution in order to avoid the risk of accident.

Dist. Col. *vs.* Ashton, *supra.*
Jacob *vs.* Bangor, 16 Me. 190.

III.

Reasonable Time of the Roller's Occupation of the Street was a Question of Law.

The court erred in rejecting the defendant's seventh prayer (19), because the question of reasonable time under the circumstances of this case was a question of law.

The prayer was addressed to the question of the length of time which defendant might allow the steam roller to remain on Park street without rendering itself liable to the charge of negligence. This was a question of law, and the court should not have left it to the jury.

Wiggins *vs.* Burkham, 10 Wall. 129.
Nunez *vs.* Dauntel, 19 Wall. 560.
19 A. & E. Ency. Law, 640.

IV.

Actual Knowledge on the part of the Plaintiff of the Presence of the Roller in Park Street Rendered Unnecessary any Warning, Sign or Barricade; and the Court Erred in Holding that the Municipality was Liable unless it had "Some one to Give Warning of this Roller by Night and by Day."

The trial court erred in refusing to grant the eighth prayer (19) of the defendant:

> "If the jury believe from the evidence that the plaintiff saw the steam roller in Park street in time by the exercise of reasonable care, to have avoided the accident, then it is immaterial whether the defendant displayed any warning sign to indicate the presence of the roller, or whether the street was barricaded so as to prevent travel over it at the point where the roller stood."

The proof was full and uncontradicted on the subject; the plaintiff as well as the defendant proved that the roller was in full sight from Fourteenth street, a distance of over nine hundred feet. The plaintiff knew it was there; and he found out that his horse was frightened at it long before he reached Pine street.

In a case of the use of a steam roller, very similar to the case at bar, it was held that there can be no liability on the part of a city or town for using the means necessary and proper for carrying out its duty in making streets or highways safe and convenient, when notice of such use has been brought home to the traveler before an injury has occurred in consequence of such use. The notice of use which it is the duty of the city or town to give the traveler is sufficient when the traveler sees and apprehends the danger in season to avoid it. Such knowledge on the part of the traveler is

notice to himself, for no one needs notice of what he already knows.

Lane *vs.* City of Lewiston, 91 Me. 292.

But perhaps the defendant was not damnified by the refusal to grant this prayer so much as it was by the court's deliberate instruction on the subject in his charge to the jury. The court told the jury that (25)—

> "it was for them to consider whether the plaintiff was not authorized to believe that the defendant would have *sufficient protection* in the neighborhood of this roller to *avert all danger.*"

The jury was thus practically instructed that the municipality was bound to insure the absolute safety of the traveller on the streets because it was its duty to *avert all dangers* by means of "*sufficient protection.*" This was plainly erroneous and it was inconsistent with and nullified the third prayer of the defendant (18) which was granted by consent. Not content with this declaration as the law of the case, the court then proceeded to place the matter beyond question and possibility of misunderstanding, saying (25):

> "But if they (the municipality) left it (the roller) there without having some one to give warning of it *by night* and *by day* you would be justified in finding that *that* was *negligence* if it was such an affair as would cause fright to be given to horses passing there."

There was no proof that there was a lantern displayed or that there was a watchman there on the preceding night, after the roller broke down; and of course the jury, therefore, had no other alternative than to follow the express direction of the court and find culpable negligence on the part of the defendant, and to assess the damages.

And yet this is a case in which the court below affirmed the trial court, declaring in its opinion (32):

> "It is only where there is a plain and obvious neglect of duty on the part of the municipality's agents that liability can arise in such cases as the present."

On the whole case it is respectfully submitted that the trial court should have directed a verdict for the defendant, and the judgment entered should be here reversed.

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No. 224.

Brief of Worthington & Frailey

Office Supreme Court U. S.
FILED
APR 8 1901
JAMES H. McKENNEY, Clerk
D. C.

Filed April 8, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 224.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

HOSEA B. MOULTON, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-6-'01

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I.

STATEMENT OF THE CASE.

This was an action for damages for personal injuries to the defendant in error caused by the negligence of the District of Columbia. On Thanksgiving day, November 26, 1896, at about 3 o'clock in the afternoon, the defendant in error started for a drive with his family, which consisted of his wife and her little child, who occupied the front seat of the vehicle with him, his wife's sister and her child, and his wife's mother, all three of whom occupied the rear seat. As the party reached the vicinity of the intersection of Park and Pine streets northwest, driving west along Park street, they approached a large steam roller, which had been left

near the middle of the carriageway on the south side of Park street, a short distance west of Pine (10). About the time that the vehicle reached the middle of Pine street on Park, the horse, frightened by the machine, almost immediately became unmanageable and would not go by it (11). The horse was rearing and backing and seemed to suddenly swing around, and as he so turned around one of the wheels of the carriage was crushed, the vehicle overturned, and the defendant in error was thrown out on Park street, four or five feet east of Pine street, and struck his head and was otherwise very badly injured (12, 13).

It appeared in evidence that the horse attached to the carriage was a gentle one, and had been driven by the defendant in error for three years without accident (10), and even past steam rollers when in operation.

The roller had been used for repairing Park street for some length of time, a week or so (15), but was not in use that day. On the contrary, it had broken down one or two days before Thanksgiving day, and had been left in the position in which the defendant in error saw it on the day of the accident (9, 13). This position was about fifty feet west of Pine street, on the south side of Park street (9–13), which latter street is forty feet wide from building line to building line. As there were about six feet of pavement on each side of the street, the width of the roadway proper was about twenty-eight feet.

On the day before the accident, and also during that day, there had been a large number of horses frightened by the roller as they passed it; in fact, about all the horses that went by showed fright (Sarah Woodland, 13; Emrich, 14). The defendant in error received no warning when he approached the roller, and it did not appear that there were any warning signs to indicate that the roller was a dangerous obstruction in the street. Shortly after the accident—the same evening—the roller was taken away by employés of the District (13). Just prior, however, to its removal and

after the accident to the defendant in error a gentleman drove along and experienced some difficulty with his horse on account of the roller, but a man led his horse by for him (13).

The case was submitted to the jury at the close of the evidence, and they rendered a verdict for $6,450 in favor of the plaintiff below, upon which judgment was entered, and the District thereupon appealed.

On October 11 and 12, 1899, the case was argued in the Court of Appeals (29) by counsel for both sides, and on the 8th of November, 1899, the Court of Appeals affirmed the judgment of the trial court, the opinion being rendered by Mr. Chief Justice Alvey (29).

In the Court of Appeals there were no errors assigned, and no questions of law were argued other than those presented to the court for decision arising from the refusal of the trial court to grant certain instructions requested by the plaintiff in error and from the granting of those asked for by the defendant in error. No error was assigned as having been committed by the trial court in its charge to the jury, and no argument was made to or heard by the Court of Appeals relating to any alleged error committed by the court below in its charge. A copy of the rule of the Court of Appeals relating to assignments of error and a copy of the assignments of error in this case in that court are appended to this brief.

II.

ARGUMENT.

1. *An action will lie against the District of Columbia for injuries resulting from the frightening of a horse by an object negligently placed and suffered to remain by the District of Columbia in one of its streets, provided such an object be naturally calculated to frighten horses of ordinary gentleness.*

That part of the first assignment of error which includes the granting by the court below of the plaintiff's first prayer and the refusal by it to grant the defendant's prayers numbered 10 to 14, inclusive, presents to this court for decision the question whether or not the District of Columbia was liable to the defendant in error for the injuries he sustained because of the frightening of his horse at the steam roller left in Park street.

The rule seems to be that when a municipal corporation permits an object naturally calculated to frighten horses of ordinary gentleness to remain within the limits of a highway maintained by that corporation for an unreasonable length of time, and an accident happens by reason of the fright of a horse at such object, the town or city is liable in an action for damages therefor, even though the object be so far removed from the traveled path as to avoid the danger of collision with it, the plaintiff in such case being, of course, in the exercise of due care.

If this proposition is correct, then there can be no doubt of the right of the defendant in error to recover of the District of Columbia, provided there was no contributory negligence on his part.

The rule just announced is, we submit, amply supported by the great majority of cases decided by the highest courts

of most of the States of the Union. In Hughes *vs.* Fond du Lac, 73 Wis., 380 *et seq.*, the court said:

"It appears from the complaint that while the plaintiff was driving with a horse and carriage, in the evening, along one of the public streets of the defendant city, his horse was frightened at a large wooden roller in the street, became unmanageable, partly overturned the carriage, and the plaintiff was thrown out upon the ground with violence and greatly injured. * * * The facts in this case show that the city created a nuisance on a public street and it is liable therefor upon the same principles as an individual would be for a similar act.

"It is fair inference from the complaint that the roller—which was an unsightly object, naturally calculated to frighten horses—was put and left in the street by the agents and servants of the city. * * * The injury was not caused by an act of nonfeasance, but by malfeasance—doing an act which was wholly wrongful. The injury was produced by its positive act as much as by its neglect."

In Foshay *vs.* Glen Haven, 25 Wis., 288–290, the court below granted the following instruction:

"An object existing within the limits of a highway but leaving the traveled path unobstructed so that the traveler is safe from collision with it, is not an insufficiency in the way merely because it exposes the traveler's horse to become frightened at the sight of it, and the town in such case would not be liable."

The appellate court reversed the trial court, holding this instruction erroneous, and saying:

"We adopt upon this subject the rule established by the supreme courts of Vermont, New Hampshire and Connecticut, that objects within the limits of a highway, naturally calculated to frighten horses of ordinary gentleness, may constitute such deficiencies in the way as to render a town or city liable, even though so far removed from the traveled path as to avoid all danger of collision."

A case almost identical with the one at bar is Halstead, appellant, *vs.* The Village of Warsaw, 59 N. Y. Supp., 518 (supreme court, app. div., 4th dept.). In that case the plaintiff, with her husband, was driving from the Erie station in the village of Warsaw towards her home. The village authorities had been using a steam roller in leveling and improving the streets. The work had been carried on in the street leading to the Erie station, and after it was finished for the day the roller was left by the roadside, where it was standing as the plaintiff's husband drove down the road from the station to the village.

The machine was about twenty feet long, ten feet high, and eight feet in width, with a smokestack, three rollers, etc., and was covered with a rubber blanket. The street was about three rods in width, and the roller left a space of about two rods for the passing and repassing of teams. As the horse was passing the roller he suddenly shied and veered off. The husband, who was driving, pulled up on him; the bit broke; the horse became unmanageable, and the husband told the plaintiff to jump, which she did, and he himself then got out at the rear of the buggy. The plaintiff was bruised and sprained by her fall. That morning the roller was in the street as the plaintiff and her husband, with two others, went towards the railroad station. The husband of the plaintiff and the ladies alighted from the wagon, and the plaintiff's brother drove the horse past the road machine. The horse shied a trifle, but exhibited no great fright. The horse was gentle, about nine years of age, and the harness was new. The night the accident occurred was not dark. A nonsuit was granted at the close of plaintiff's case. The appellate division, in reversing the trial court, said:

"The nonsuit was error. The street was intended for the public, and while the municipal authorities necessarily were entitled to its use to improve and repair it, they must exercise that use in a way to insure the safety of travelers so far

as compatible with the temporary interference of those intrusted with its care. When work upon the street is suspended for the day, if there is any obstruction to its unrestricted use, then that obstruction should be guarded so it is not a menace to the traveler. If there is an excavation in the street, it must be protected by lights or barricades to apprise the wayfarer of danger. The jury might well say this machine would tend to frighten horses, and, if so, it was incumbent upon those having it in charge to see it was removed from the street when the work was completed for the day. It was left in a narrow street, taking up one-third of its width. It was a place where horses going to and from the railroad station to the evening train must necessarily pass."

Numerous cases may be cited illustrating the great number and variety of objects which have been found to frighten horses, thereby rendering the municipality liable for injuries resulting therefrom. A dead horse in a street caused a runaway, and the municipality was held responsible in Chicago *vs.* Hoy, 75 Ill., 530.

A large rock dug up and left in the traveled way by a city was considered sufficient to support an action for injuries caused by the frightening of a horse by the rock.

Card *vs.* City of Ellsworth, 65 Maine, 547.

Lumber piled on each side of a highway and in the roadway, having been unloaded from railway freight cars, has been held to be such a defect in a highway as to make a township liable for the loss of a horse which had become frightened at the lumber. The court in this case decided that it was settled law that objects ordinarily calculated to frighten roadworthy horses, placed and suffered to remain in a public highway, are sufficient defects to make a municipal corporation liable after due notice; and it also held that, no matter if the lumber was not in the traveled route, the fact that it was on the edges of the highway did not alter the liability of the township, as in either case *the trav-*

eled route was rendered unsafe (North Manheim Township *vs.* Arnold, 119 Pa. State, 389).

A tent standing within the limits of a highway and partly on the traveled path and so constructed and decorated as to be an object of terror to horses was pronounced a nuisance, and the city held responsible for injuries resulting from the fright of a horse thereat, in Ayer *vs.* Norwich, 39 Conn., 377.

Bales of charred hay, unloaded from freight cars and thrown into a highway close to the traveled part of the roadway and suffered to remain by the town several hours after one of the selectmen thereof had due notice, were decided by the court to be sufficient to render the highway unsafe, the same being an obstruction calculated to frighten ordinary horses (Morse *vs.* Town of Richmond, 41 Vt., 435).

A town was held liable for damages resulting from the fright of a horse at a candy machine, consisting of a tripod holding a little pan for boiling candy, and a lamp containing a fire under the apparatus. In this case it was held that the municipality was liable for injuries resulting from the fright of an ordinarily gentle horse at an object likely to frighten such horses, which the city negligently placed or permitted to be placed and remain on its streets.

Town of Rushville *vs.* Adams, 107 Ind., 475.

A steam roller was left in the street of the city of New Haven during the cessation of work thereon from Saturday noon until Monday morning. The roller, though useful to repair the road, was an object calculated to frighten horses. The plaintiff's horse became frightened and injuries resulted. The city was held liable therefor (Young *vs.* City of New Haven, 39 Conn., 435).

A projecting pig-sty was made the basis of a suit for damages due to the fright of the plaintiff's horse at the obstruction and the noises of the pigs, etc. On demurrer the supreme court of New Hampshire held that the action could be maintained on the ground that after notice and a reason-

able opportunity to remove them a town is liable for injuries resulting from the fright of a horse at an object on the highway calculated to frighten horses of ordinary gentleness.

Bartlett *vs.* Hooksett, 48 New Hampshire, 18.

See also a very clear summary of the cases on this point in vol. II, section 1011, Dillon on Municipal Corporations, and note, and II Beach on Pub. Corp., sec. 1513, and cases cited.

The evidence in the case at bar showed clearly that the object at which the defendant in error's horse took fright was one calculated to frighten horses of ordinary gentleness, as at least a dozen horses had passed by it and yet had been scared and had shied (13, 14).

Although there was space to pass it, the roller was within the traveled highway (10, 14). The horse driven by defendant in error was a gentle horse and had not shown fright at steam rollers in motion when driven past them by him. The roller had been placed in the position which it occupied at the time of the accident by the agents of the plaintiff in error, and had been by them suffered to remain there for one or two days prior to the happening of the accident (9), and was removed to a vacant lot (9, 13) within an hour or two after the injury to the plaintiff. This state of facts the jury found to exist, and, that being so, under the foregoing authorities the plaintiff in error, we submit, was liable in the absence of contributory negligence on the part of the defendant in error.

Some question is made in the brief of adverse counsel, at page 20, that the length of time which an object must remain in the highway before the plaintiff in error could be charged with negligence was a question of law for the court, and some authorities are cited supposedly in support of that proposition, but reference to them, we think, will hardly justify that supposition, and no further mention need be made

of them here. Suffice it to say that it is a general rule that what constitutes negligence on the part of one sought to be held for results flowing therefrom is a matter of fact for the determination of a jury—and in this case the unreasonableness of the length of time which the District allowed the roller to remain in Park street was one which the jury were to find under all the circumstances before they could determine the negligence of the plaintiff in error. (See Young *vs.* New Haven, 39 Conn., 435; Ayer *vs.* City of Norwich, 39 Conn., 376.)

The first prayer, therefore, of the defendant in error was properly granted, and the prayers requested by the plaintiff in error numbered 10 to 14, inclusive, were properly refused.

2. *The question of the contributory negligence of the defendant in error was one for the jury, and was properly submitted to them by the trial court.*

The second instruction granted on behalf of the defendant in error and excepted to by the plaintiff in error presents the question of contributory negligence as applicable to cases of sudden danger. The jury were instructed that the law did not require of the defendant in error that he should pursue the safest and best course of action at the time of the accident, but that it did require that he should act as an ordinarily prudent and careful man would have acted under the circumstances.

In the case of Union Pacific Railway Co. *vs.* McDonald, 152 U. S., 262, 281, this court endorsed the doctrine laid down by the New York court of appeals that "persons in sudden emergencies and called to act under peculiar circumstances are not held to exercise the same degree of caution as in other cases." The Court of Appeals of the District

of Columbia has also declared the same doctrine in the case of Railroad Company *vs.* Hickey, 5 Appeals D. C., 436–471.

The eighth and ninth prayers asked for by the defendant and refused by the court are clearly defective and directly repugnant to the law as set forth in the cases just cited. Further, that the roller left in the street, in the manner described by the witnesses, was an obstruction, dangerous and likely to frighten horses, we have already shown, and the authorities cited above in support of the right of the defendant in error to maintain his case uphold the view that it was incumbent upon the plaintiff in error to take the proper precautions to prevent accident. The eighth prayer of the plaintiff in error (19) was clearly erroneous. In all the cases cited on either side in this case in which horses have been frightened by obstructions the statement of the facts indicates that the person injured must have seen the obstruction before the accident, but in none of them is it even suggested that it was contributory negligence not at once to turn back; and in this case the undisputed evidence (13, 14) shows that before the accident occurred out of which this suit arises many other horses had shied at this steam roller, but that all with more or less difficulty had been induced by their drivers to go safely by it. Surely what so many persons did cannot be contributory negligence *as matter of law.*

The ninth prayer asked for has much the same vice as its predecessor. It declares that because the roller was on Park street for the purpose of being used (not that it was *then* being used) in the work of repairing that street it was not an obstruction—a proposition directly opposed to the cases cited in support of the defendant in error's right of action; and, further, it requires the jury to find that the defendant in error was practically blind in order to entitle him to a verdict in his favor.

What is said in the opposing brief by way of argument from the evidence to show that the defendant in error reck-

lessly forced his horse to go on after his fright was apparent was proper enough in the argument to the jury, but cannot avail here. The weight of the evidence was strongly against any such contention.

The roller was about 50 feet west of Pine street, on Park street (9, 10, 11, 14). The defendant in error, testifying in his own behalf, said that when he reached the east line of Pine street the horse seemed in a moment or two to be intensely frightened, and that when he got up to about the middle of Pine street his horse became unmanageable; that then he saw that his horse was badly frightened and could not go by the machine, "but the horse gave him no chance to go back, or turn, or go down Pine street (10)." The witness Turnburke testified that they had reached Pine street when the horse showed symptoms of fright, and that Mr. Moulton tried to control him, but the horse was *terribly frightened in the beginning;* that "*the whole thing took place in thirty or forty seconds,*" and that the horse was badly frightened, and Mr. Moulton "*did not have a chance to do anything at all;*" that he had no opportunity to do anything by way of coaxing or otherwise (11). The witness J. F. Vanfleet testified that the road was peculiar along there, as it sags down on each side, and the plaintiff turned to the right to go by the roller, and the witness noticed the horse commencing to rear and plunge and continue a little further, but not very far. He saw the plaintiff pull on the reins, and the horse was *getting very much frightened at that time:* "*it was all in a moment almost,*" and, as the horse plunged back *almost instantly,* the carriage was turned over (12). The wife of this witness testified that the plaintiff's horse was proceeding quietly until he came within 50 feet of the roller, when the horse seemed frightened and did not care to go by, and "with that the horse reared on his hind legs," etc., and there was a crash, and the wheel was dished under the buggy (12, 13). It therefore appears from the evidence that the fright of the horse and Mr. Moulton's actions with

respect thereto were almost simultaneous with the accident which resulted in his injury, and that instead of the defendant in error attempting to urge his horse past the roller after it had become thoroughly frightened, the contrary happened, and he was not given time to either control the horse or decide upon a plan of action. But the whole question as to whether Mr. Moulton, under these circumstances, did as a reasonably prudent man should do under the same circumstances was passed upon by the jury in favor of the defendant in error, and, we submit, that question was finally concluded by their verdict.

Therefore the first and second assignment of errors are not well taken.

By the tenth prayer of the plaintiff in error, which was refused by the trial court, it was sought to apply in this jurisdiction the doctrine laid down by the supreme judicial court of Massachusetts. The law governing the liability of a municipal corporation in that State for injuries resulting from defective highways is based upon a statute which in that State has been construed to apply only to actual physical defects in the highway and not such as merely cause fright of horses, and that therefore, unless there is actual contact between the vehicle and the defect in the highway and injuries resulting therefrom, no action will lie.

In this jurisdiction this action is based upon the common law and is not governed by any statute. The doctrine announced by the Massachusetts court is, however, not in accord with the great weight of authority, as has been seen in the cases already cited in this brief, and this fact was recognized by the Court of Appeals in its opinion in this case (35). Even in some of the other New England States, where actions of this kind are statutory, as in Massachusetts, the rule announced by that State is not followed (Card *vs.* City of Ellsworth, 65 Me., 547; Ayer *vs.* City of Norwich, 39 Conn., 377; Morse *vs.* Town of Richmond, 41 Vt., 435–440; Bartlett *vs.* Hooksett, 48 New Hampshire, 18).

From the foregoing, it is submitted that the defendant in error had a right to maintain his action, and that he was not guilty of contributory negligence.

Cases Cited upon the Brief of the Plaintiff in Error.

A few remarks will not be out of place concerning some of the authorities cited in the brief filed here on behalf of the plaintiff in error.

In support of their contention that no action is maintainable in such a case as this one, they have cited on page 10 of their brief the case of Sparr *vs.* St. Louis, 4 Mo. App., 572, which appears to be one of the cases in the appendix of that volume under the heading "Statement of points decided in cases not reported."

In Macomber *vs.* Nichols, 34 Michigan, 212, it was held that a steam vehicle had rights on a public highway, as well as horses, and that the question of negligence in the management of it was one for the jury.

The Massachusetts cases cited on the brief of adverse counsel we do not comment upon here, as the Massachusetts doctrine has already been discussed. Counsel quote at some length from the opinion of the court in the case of Nichols *vs.* Athens, 66 Me., 402. They omit, however, to insert a portion of the quotation which reads, "But we think that the circumstances of this case render it very doubtful at least whether the colt (so called by the female plaintiff) was safely adapted to travel on the road." The case was left to the supreme judicial court of Maine to decide it both upon the law and the facts, and they seem to have thought the horse was untrustworthy.

In Kumbo *vs.* Gilham, 103 Wis., 312, a buggy was left on edge within about ten feet of the roadway, but not in the roadway itself. It appeared that the buggy was originally left by the defendant's agent in an upright position, but by some unknown agency had been overturned. The plain-

tiff's horse was frightened by it in the latter position. It was held that the buggy as it had been left originally was not an object likely to frighten horses, but that the defendant (whose son had been driving) was not liable for the act of the unknown agency which turned the buggy up on edge, and it was not reasonable for a person leaving a buggy in its original position ten feet from the road to anticipate that it would be "put in a position likely to frighten horses." This was a suit against an individual. The municipality was not a party.

In Cairncross *vs.* Pewaukee, 78 Wis., 66, the court comments with approval upon Hughes *vs.* Fond du Lac, 73 Wis., 380, cited in this brief, *supra*, and with reference to an obstruction permitted to be in a highway for an unlawful purpose, makes the point that if the steam roller (in Hughes *vs.* Fond du Lac, *supra*) was in use, or being in process of transportation, it was then lawfully upon the highway; otherwise it was not.

In the case of Edgerly *vs.* Concord, 59 New Hampshire, 78, where a stream of water was thrown into a street by a fireman, it was held that the declaration was defective in attributing the injury to the defective highway, when the real cause of action was the act of a fireman throwing water from a hose; and it was also held that the authorities agree that a town is not responsible for damages done by its fire department.

The case of Agnew *vs.* City of Corunna, 52 Michigan, 428, is cited on page 13. The court in that case decided, first, that the statute under which the action was brought applied only to actual defects in the highway, and that objects in the street likely to frighten horses were not such defects; and the court also said that, even if the city was liable for objects likely to frighten horses left in the street, the result of the action depended upon negligence in fact, and, as it had been left in this case to the jury to say whether the stone which had been dug up and left in the highway was a nuisance and whether it had

been allowed to remain a reasonable or unreasonable time, the court could not say, as a matter of law, that it was a nuisance in itself. The jury in this case had found a verdict for the defendant. It also appeared that the municipality had agreed to let a man have the boulder for building purposes and was waiting for him to take it away when the accident happened.

The case of Cain's Administrator *vs.* Ohio Valley Tel. Co., 47 S. W. Rep. (Ky.), 759, was one in which there had been no negligence on the part of the defendant.

In the case of The Board of Commissioners *vs.* Rickel, 106 Ind., 501, cited on page 13 of the opposing brief, it was held that a *county* was not responsible for *defective highways at all*, but only for defective bridges, and that therefore an accident that occurred in the highway by reason of a horse becoming frightened at a plank standing upright on the bridge could not be made the subject of a suit against the county, because the person injured was not at the time actually *using* the bridge.

In Brown *vs.* Mayor, 57 Missouri, 156, cited on page 14 of the brief of counsel for plaintiff in error, the court decided that the proximate cause of the accident in that case was the fact that the driver abandoned the control of his horse.

As to the case of The District of Columbia *vs.* Ashton, cited on page 16 of the same brief, it is quite obvious that it has no application to the case at bar.

Counsel have cited upon the same page of their brief three cases in this court in support of the proposition that one cannot assume a position of danger and then recover for an injury which would not have happened but for such position. The first of these cases, Railroad Co. *vs.* Jones, 95 U. S., 439, was where the plaintiff rode upon the cow-catcher of an engine. The other two cases, Railroad Co. *vs.* Houston, 95 U. S., 697, and Schofield *vs.* Railroad Co., 114 U. S., 615, were cases in which the plaintiffs were injured while walking across a railroad track without looking or listening.

Manifestly these cases do not apply, as the defendant in error did not voluntarily place himself in a position of known danger. That the defendant in error did what a reasonably prudent man would have done under the circumstances was established by the verdict of the jury which had that question before them.

The eighth prayer requested by the plaintiff in error and refused by the court has already been considered on page — of this brief, but on page 21 of the brief of opposing counsel it is made the subject of a special heading in connection with a certain portion of the charge of the court below, and the two together are embodied in and made the subject of the fourth assignment of errors. As we stated at the outset of this brief, counsel for the District in the Court of Appeals neither assigned as error any portion of the charge of the trial court nor made it the subject of argument. The supposed erroneous portion of the charge is made the subject of comment in this court for the first time. How can counsel ask this court to hold that the court below erred as to a matter upon which it expressed no opinion, and which was not presented to it for determination?

Again, this contention is based upon the assumption that there was no evidence in the case as to the failure of the District to provide warning signs night or day. But the bill of exceptions does not purport to contain all the evidence. It states merely (17), "The foregoing being all the evidence as to the nature and circumstances of the accident to the plaintiff." The counsel for the District, evidently not intending to make this point in the Court of Appeals, industriously omitted the evidence which might be held to relate to it. It will not do for them to set up such a claim here under these circumstances.

Finally, there was no error in the charge. The jury were plainly told by the first instruction granted at the request of

the defendant in error (17) what they must find to entitle him to a verdict; and they were told by the second instruction granted at the request of the District (18) that if the defendant's negligence in any degree contributed to the accident he could not recover. The reference of the court to the night-time was merely by way of illustration. The excepted portion of the charge (25, 26) is but a part of what the court said on this subject. After the language excepted to, the court referred further to what might happen at night, and then added: "That would be culpable in the daytime in the same way with horses which are high-spirited."

For all these reasons we submit the judgment below should be affirmed.

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Attorneys for Defendant in Error.

APPENDIX.

EXTRACT FROM RULE VIII OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA RELATING TO "ARGUMENT OF CAUSES AND THE PREPARATION THEREFOR."

"SEC. 3. The counsel for the appellant shall file with the clerk of the court, at least five days before the case is liable to be called for argument, under the rules of this court, fifteen copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged on the opposite side. Such brief shall contain, *in the order here stated*:

"(1.) A concise statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

"(2.) The assignment of errors relied upon by the appellant, to be separately and specifically stated; and if the supposed error is assigned to the ruling upon the report of an auditor or master, the specification shall state the exception to the report and the action of the court thereon.

"(3.) A clear statement of the points of law or fact to be discussed, with reference to the pages of the record, and the authorities relied on in support of each point."

COPY OF ASSIGNMENT OF ERRORS IN BRIEF ON BEHALF OF THE DISTRICT OF COLUMBIA IN THE COURT OF APPEALS.

"*Assignment of Errors.*

"1. The court erred in granting the plaintiff's first prayer (19), and in refusing to grant the defendant's first prayer (23), ninth prayer (22), tenth prayer (22), eleventh prayer, twelfth, thirteenth and fourteenth prayers (23), because (*a*) the presence of the steam roller in Pine street was not an actionable obstruction thereof; (*b*) no action will lie against the District of Columbia for injuries resulting from the

frightening of a horse by a steam roller at rest in its streets, and (c) the plaintiff was guilty of contributory negligence.

"2. In granting the plaintiff's second prayer (20), because the same was misleading and does not correctly state the doctrine of contributory negligence.

"3. In rejecting the defendant's seventh prayer (22), because the question of a reasonable time under the circumstances was a question of law.

"4. In rejecting defendant's eighth prayer (22), because the object of a warning, sign, or barrier is to give notice; actual knowledge accomplished that object and supersedes the necessity for such notice."

Supreme Court of the United States.

No. 224.—October Term, 1900.

The District of Columbia, Plaintiff in Error, vs. Hosea B. Moulton.	In error to the Court of Appeals of the District of Columbia.

[May 27, 1901.]

This action was begun by the defendant in error in the Supreme Court of the District of Columbia. In substance he asserted in his declaration a right to recover from the District of Columbia a specified sum, upon the ground that by its negligence, on November 26, 1896, he had sustained serious personal injury. The negligence averred consisted in this, that for a space of two days prior to and including the dated named the District had negligently and knowingly left upon a public highway known as Park street a large steam roller, which was calculated to frighten horses of ordinary gentleness; and while plaintiff was driving along said street, with due care, in a carriage drawn by a horse of that disposition, the animal was frightened and rendered unmanageable by the steam roller, and in the struggles of the horse one of the wheels of the carriage was broken, plaintiff was thrown out upon the ground with great force, and he sustained the injuries for which recovery was asked. Defendant filed a plea of the general issue.

The evidence most favorable to the contention of the plaintiff tended to show the following: Park street is a public highway in the northwest section of the city of Washington, commencing at Fourteenth street and running westwardly. For several days prior to the accident in question a steam roller had been used in connection with the work of resurfacing Park street with macadam. This roller was of the kind usually employed in constructing macadamized gravel roads. It had three wheels, the tread of the rear wheel being about eight feet, which was its extreme width. The machine was about eight feet long and about five or six feet high. The smoke stack was a little higher than the other part of the machine. While the roller was in use, on the forenoon of the day before the accident hereinafter referred to, it "broke down." The nature of the injury to the roller does not appear, otherwise than as it may be inferred from the fact that the roller was subsequently removed by horse power, that the machinery was simply disabled. On becoming out of order, the roller was placed close to the south curb of Park street, from twenty to fifty feet west

of Pine street—a street fifty feet in width—and distant about nine hundred feet westwardly from Fourteenth street. Over the roller was placed a canvas cover. The roadway proper, at the point where the roller was stationed, was about twenty-eight feet wide, and there was ample room for the passage of vehicles between the roller and the northerly side of Park street.

About 3 o'clock on the afternoon of November 26, 1896, (Thanksgiving Day,) plaintiff drove into Park street from Fourteenth street, and as he did so saw the steam roller. The horse he was driving was one which the plaintiff had owned for several years, was regarded as of an ordinary gentle disposition and had several times been driven safely past steam rollers when they were in actual operation. Plaintiff guided his horse, intending to pass by the roller in the space to the right thereof, but on approaching Pine street the horse became restive—from the flapping of the canvas cover on the roller or from some other cause—and when about opposite the middle of Pine street became unmanageable, reared and upset the vehicle, throwing out and injuring the plaintiff. The evidence also tended to show that other horses in passing the roller had exhibited fear.

The case was tried to a jury, and resulted in a verdict for the plaintiff. On appeal the judgment was affirmed by the Court of Appeals of the District. (15 App. D. C. 363.)

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

That the District of Columbia is not an insurer of the safety of travelers upon its streets is, of course, unquestioned. This being so, we think the lower courts erred in upholding the liability of the District for the injuries sustained by the plaintiff, under the circumstances disclosed in the record.

The steam roller in question had been brought to the place where the accident occurred for a lawful purpose, viz., that of performing a duty enjoined upon the District to keep in repair the streets subject to its control. The use of an appliance such as a steam roller was a necessary means to a lawful end—a means essential to the performance of a duty imposed by law. It must, therefore, follow that if in the legitimate and proper use of such machine, with reasonable notice to the public of such use, an injury is occasioned to one of the public, such injury is *damnum absque injuria*. (*Lane* v. *Lewiston*, 91 Maine, 292, 294; *Morton* v. *Frankfort*, 5[illegible] Maine, 46; *Carincross* v. *Pewaukee*, 78 Wis. 46, commenting upon and explaining *Hughes* v. *Fond du Lac*, 73 Wis. 380.) Conceding that the roller was an object calculated to frighten horses of ordinary gentleness, yet, at the most, the liability of the municipality for negligently permitting such objects to remain within the limits of a highway, if it exists,

must primarily be dependent upon the fact that they are unlawfully upon the highway.

The sole negligence complained of in the declaration was averred to consist in keeping the steam roller in question on Park street for the space of two days so as to be a public nuisance and dangerous to travelers passing along said street with their carriages and horses. There was no allegation that the roller in consequence of its being disabled presented such a changed appearance that the danger of its frightening an animal was enhanced. Nor was there any averment that the negligence was committed in the use of the canvass covering, and no proof was offered on the trial tending to show that such a cover was not the means usually employed to protect steam rollers from the weather when they were lawfully on the street and for the time being not in use.

Where but one inference can reasonably be drawn from the evidence the question of negligence or no negligence is one of law for the court. (*Northern Pacific Railway Co.* v. *Freeman*, 174 U. S. 379, 384; *Metropolitan Railway Co.* v. *Jackson*, 3 App. Cas. 193.) It is only where the evidence is such that reasonable men may fairly differ as to the deductions to be drawn therefrom, that the determination of the fact of negligence should be submitted to a jury. (*Warner* v. *Baltimore & Ohio R. R. Co.*, 168 U. S. 339, 348.) The question which here arises then is, Did the evidence justify the trial court in permitting the jury to determine whether or not in allowing the disabled roller to remain at the place referred to, under the circumstances stated, the District negligently and unlawfully obstructed the highway?

We shall assume that the period when the steam roller became unserviceable while in use on Park street was the forenoon of the day prior to the accident, as claimed by the plaintiff. The right, however, to use a steam roller upon a public street for the purpose of the repair of such street we think necessarily includes the right to retain the roller upon the street until a reasonable time after the necessity for the use of the machine has terminated, in the meantime exercising due care in the deposit of the machine when not in use and giving due notice and warning to the public of the presence of such machine if travel upon the street is permitted. We can perceive no difference in principle between using and keeping a steam roller on the streets until the completion of a particular work and the maintaining a lawful excavation, such as for the construction of a sewer or of an underground road and the use of an engine, derrick, &c., in connection with the hoisting of earth from an excavation. The appliances used in connection with such excavations, even though calculated to frighten horses of ordinary gentleness not familiar with such objects, undoubtedly may be retained at the place where needed until the necessity therefor has ceased, and the circumstance that such appliances become

temporarily disabled cannot, in reason, be held to affect the right of the municipal authorities to keep such machinery on the works until in the ordinary course of events and in the exercise of a reasonable discretion it is found convenient either to there make the needed repairs or to remove the appliances elsewhere for that purpose. Now, the only inference warranted by the record is that when the steam roller in question got out of order it was being used upon the street, and the necessity for its further use continued to exist. Had the machine not broken down or had needed repairs been made to it at the place where the roller was deposited, it might lawfully have been allowed to remain upon the street while its further use was required, and until it was reasonably convenient to remove it. Under such a state of facts as has been detailed there was nothing either in the circumstance of the disabling of the machine or in the detention warranting the inference that the right to leave the roller upon the street over a legal holiday did not exist, and that an illegal use of the highway had originated. It follows that the facts in evidence respecting the keeping of the roller on Park street during the period referred to did not justify the submission to the jury of the question whether the District was negligent in so keeping the machine, as it could not reasonably have been inferred that the employees of the District were negligent in failing to remove the machine before the occurrence of the accident.

As respects the notice owing to the plaintiff of the presence of the roller. We agree with the opinion of the Supreme Judicial Court of Maine in *Lane* v. *Lewiston*, *supra*, that where a steam roller is allowed to remain upon a municipal highway it is requisite that the municipality causing the obstruction should give reasonable notice to the traveling public of its presence, but that a view of the obstruction itself in time to avoid it without injury amounts to notice. In other words, as stated by the Maine court, "No one needs notice of what he already knows," and "Knowledge of the danger is equivalent to prior notice." (91 Maine, 296.) That the plaintiff had notice of the presence of the roller on Park street in ample time to have avoided it, is undisputed. When he turned from Fourteenth street into Park street it was broad daylight, there was nothing to obstruct his view westward, and in fact he testified that the roller was in plain sight. He was not induced or directed by the agents of the District to proceed past the roller. He knew that such objects sometimes frightened horses, but from his acquaintance with the disposition of his horse he believed that he could control the animal and drive safely past the roller, and he voluntarily undertook to do so. Now, it seems clear—particularly as the danger was neither hidden nor concealed—that the District was under no obligation to restrain the plaintiff from attempting to pass, either by closing Park street or by other means. The District was not bound to presume that it would be *necessarily* hazardous to attempt to drive past the

roller, stationary and quiet as it was, and familiar as horses in a large city usually are to the sight and sounds of electric and cable cars and horseless motors. The District, at best, was only chargeable with notice that the roller was an object which might frighten some horses of ordinary gentleness, not that it would inevitably do so. It was bound to give sufficient warning to drivers of the presence of the roller in time to enable them to avoid passing it, if desired. The District, however, had a right to assume that a driver of mature age was familiar with the habits and disposition of his horse, and was possessed of the common knowledge respecting the tendency of steam rollers to occasionally frighten such animals. The roller being lawfully on the street, the District was not bound to guard against the consequences of a voluntary attempt to drive by this roller. Certainly, if a driver believed that it would not be the natural and proper consequence of such an attempt that his safety would be endangered, the District ought not to be charged with notice that the attempt would be dangerous either to life or to limb.

The foregoing observations sufficiently indicate the errors committed by the trial court in the instructions given to the jury and in the refusal to give requested instructions, to which exceptions were noted. It suffices to say in conclusion that the trial court erred in refusing to instruct the jury, as requested, that upon the whole evidence in the case their verdict should be for the District. As said by this court, speaking through Mr. Justice Blatchford, in *Schofield* v. *Chicago & St. Paul Railway Co.*, (114 U. S. 615, 618):

"It is the settled law of this court that, when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. (*Improvement Co.* v, *Munson*, 14 Wall. 442; *Pleasants* v. *Fant*, 22 Id. 116; *Herbert* v. *Butler*. 97 U. S. 319; *Bowditch* v. *Boston*, 101 Id. 16; *Griggs* v. *Houston*, 104 Id. 553; *Randall* v. *Baltimore & Ohio Railroad Co.*, 109 Id. 478; *Anderson County Comrs.* v. *Beal*, 113 Id. 227; *Baylis* v. *Travelers' Insurance Co.*, Id. 316.)"

The judgment of the Court of Appeals of the District of Columbia is reversed, with instructions to that court to reverse the judgment of the Supreme Court of the District of Columbia, and to grant a new trial.

True copy.

Test:

Clerk Supreme Court, U. S.